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91-1800

Supreme Court, U.S.
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No._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

IN RE: HARLOW FAY, INC.,

Debtor.

HARLOW FAY, INC.,

Petitioner,

v.

FEDERAL LAND BANK OF
ST. LOUIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the District Court wrongfully deprived Petitioner of its right to appeal the dismissal of its Chapter 11 bankruptcy case by refusing to allow a further extension of time to file brief based on an erroneously high and strict standard of excusable neglect; and whether the Court of Appeals was correct in affirming the dismissal of the appeal?

II. Whether the standard for allowing further time to file an appeals brief, or the untimely filing of an appeals brief, is one of good faith and good cause shown, liberally construed and reasonably applied to do justice (the practice in most circuits).

III. Whether the proper standard is one requiring a showing of bad faith, gross negligence or indifference in order to refuse a brief and dismiss the appeal.

LIST OF PARTIES

The parties to this action are as follows:

The Petitioner is Harlow Fay, Inc., Box 102, LaClede MO., 64651.

The Petitioner's Attorney in this Court and below is William L. Needler of William L. Needler & Associates, Ltd., Airport Road, P.O. Box 177, Ogallala, NE 69153, Phone (308) 284-4505; and 8 South Michigan Ave., Suite 1300, Chicago, IL 60603, Phone (312) 236-4505.

Below Petitioner was also represented by local counsel: Jackie Bailey, 116 West Ritchie, Marceline, MO 64658.

The Respondent is Federal Land Bank (Farm Credit Bank) 1415 Olive Street, St. Louis, MO 63101.

The Respondent's Attorney is Charles E. Rendlen, III, P.O. Box 1255, 108 North

Third Street, Hannibal, MO 64628.

An interested party is Farmers Home Administration, #1 Fairground Road, Brookfield, MO 64628.

Farmers Home Administration is represented by the U.S. Attorney, United States Court House, 1114 Market Street, St. Louis, MO 63101.

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PETITION FOR WRIT OF CERTIORARI
TO THE
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FOR THE EIGHTH CIRCUIT

The Petitioner, Harlow Fay, Inc. prays that a writ of certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Eighth

Circuit entered on December 17, 1992. The parties were informed by letter of the entry of the judgment of the Court of Appeals on the Court's docket on December 17, 1992. (A 6-7)[1]

OPINIONS BELOW

The December 17, 1992 opinion of the Court of Appeals for the Eighth Circuit is reported as In re Harlow Fay, Inc. (Harlow Fay, Inc. v. Federal Land Bank of St. Louis, 951 F. 2d 175 (8th Cir. 1991), and also appears at A 1-5). A petition for rehearing with suggestion for rehearing en banc was denied on February 6, 1992. (A 8).

The District Court Opinion, rendered on May 5, 1989, dismissing the case for failure to file timely brief, is not

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[1]A stands for the Appendix to this Petition.

reported but appears here at A 10-13).

The court's Order appears at A 9).

JURISDICTION

The bankruptcy court derives its jurisdiction by referral pursuant to 28 U.S.C., sec. 157. The district court derives its original jurisdiction of bankruptcy cases pursuant to 28 U.S.C., sec. 1334 and its appellate jurisdiction from 28 U.S.C., sec. 158. The Court of Appeals gains its jurisdiction under 28 U.S.C., sec. 158. This Court gains its jurisdiction under 28 U.S.C., sec. 1254(1).

STATUTES INVOLVED

This case involves the scope, meaning and construction of the following Rules:

1. Bankruptcy Rule 8008(a) appears at A 56.

2. Bankruptcy Rule 8009(a) appears at A 57-58.

3. Bankruptcy Rule 9006(b)(1)(2) appears at A 58-60.

4. Federal Rule of Civil Procedure 6(b)(1)(2) appears at A 60-61.

5. Federal Rule of Civil Procedure 60(b)(1) appears at A 61.

6. Federal Rule of Appellate Procedure 31(c) appears at A 62.

7. Federal Rule of Appellate Procedure 26(b) appears at A 62.

8. Federal Rule of Appellate Procedure 4(a)(5) appears at A 63-64.

STATEMENT OF THE CASE

I.
Background Facts

This case arises from the farm crisis of the mid-1980's which has persisted in varying degrees down to the present.

After the run-up in farm prices and high inflation of the early 1980's farmers were hard-pressed to stay afloat after the bubble burst and prices of farm commodities and land collapsed. (See A 42-50).

Harlow Fay, Inc. is the corporate organization of the Fay family. It was forced to file a Petition under Chapter 11 in 1985.

A Plan of Reorganization, was confirmed on May 23, 1986. No evidence was adduced at the hearing regarding the confirmation standards of 11 U.S.C., sec. 1129, including the feasibility or valuation of the Plan. The order confirming the Plan was not the official form which lists the specific findings to support the requirements of Section 1129, but was a summary version. (See Short Form No 31,

West, Bankruptcy Act, Rules & Forms, 87 Rev. ed., p. 739, 740).

The Plan treated the Federal Land Bank of St. Louis (FLB) as having a secured claim for $284,000.00. Debtor contends that the actual secured claim, or the value of 500 acres of land, was not $284,000.00; that this figure was from an earlier irrelevant date. Because the $284,000.00 figure was used, the annual, amortized payment was higher than should have been allowed. The higher payments resulted in a Plan that was tenuous from the beginning, and in the end proved to be unworkable.

In 1987, when Plan payments could no longer be made, the Debtor filed a modification of the Plan to correct the valuation. The modification also treated the claims of other creditors, i.e. the

Farmers Home Administration (FmHA) and the Bank of Brookfield. Debtor, the Bank and the FmHA were able to enter into stipulations approving the modifications.

Meanwhile, however, FLB and the above other creditors had filed motions to dismiss Debtor's Chapter 11 proceeding. A hearing was conducted on the motions to dismiss. Officers of the Debtor testified as to why the old plan was not feasible, why the plan as modified would be feasible, the propriety of the modified valuation, and other matters.

Amended modifications were to be filed on December 6, 1988 pursuant to the bankruptcy court's order of November 16, 1988. Meanwhile Debtor's counsel worked to iron out the modifications with the creditors.

Due to a press of emergency matters, however, the modification involving FLB was submitted to the Court pursuant to a motion to file instanter at the hearing on December 13, 1988.

At the December 13, 1988 hearing, the Court approved the modifications of the plan pursuant to the stipulations between the Debtor and FmHA and the Bank. The Court, however, granted the motion of FLB to dismiss the Chapter 11 proceeding, finding a material default in the confirmed plan, and denying Debtor's motion to modify. Debtor's motion to reconsider was summarily denied. The appeal, which is partly the subject matter of the litigation which brings us to this Court, was lodged in the District Court, contending, inter alia, that the above was clearly erron-

neous and an abuse of discretion (it being obvious that the debtor could reorganize under a modified plan, as demonstrated by the evidence and agreement of the other creditors).

Of all parties, it ill behooves the government to stand in the way of a farmer's reorganization.

II.
Facts Bearing On Issue Of Whether Brief in District Court Was Timely Filed.

Unexpectedly, in 1988, a serious draught plagued the Midwest affecting many of the Needler firm's clients (it's practice is almost entirely limited to serving farm debtors in Chapter 11 proceedings). As a result, the Needler firm temporarily ran out of funds and it was necessary on February 15, 1989, to reduce the firm from four lawyers to one. The Chicago office was closed and small pilot

space was secured in that city with no staff. Operations in the main were to be and are conducted at much lower cost at the firm's offices in Ogallala, Nebraska. (Affidavit of William Needler, A 36-37).

Handling the logistics of the appeal of this case for the Debtor in the District Court at that time was Attorney James C. Truax,[2] who departed the Needler firm on February 15, 1989. The notice of appeal had been timely filed in the bankruptcy court on January 15, 1989.

On February 7, 1989, the final designation for record was filed by Debtor, and contained a request for the transcript of the evidentiary hearing on December 13, 1991, previously mentioned.

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[2]Attorney Truax was not very familiar with all that had transpired below because Mr. Needler had handled those proceedings.

(Motion to Reconsider, A 27)

The day before, on February 6, 1989, the "tapes" of the hearing had been ordered from the Clerk of the bankruptcy court who suggested that the tapes be transcribed in Chicago in order to save time. (Motion to Reconsider, A 21-22,28)

Mr. Needler, who took over the appeal from Mr. Truax did not at first understand that he was to employ a Chicago court reporter to transcribe the tapes. However, the tapes, after a short delay, were delivered to one of Chicago's best court reporters, Ms. Carol Raber. (Needler Affidavit, A 37-38).

However, due to an unexpected illness and a sudden flood of emergency matters, Ms. Raber could not promptly perform the task. It was not until April 22, 1989 that counsel received the tran-

scriptions. (Needler Affidavit, A 37-41).

Meanwhile, debtor had applied for and received two extensions to file brief to and including March 27, 1989 (the brief being due by rule on February 22, 1989). (Dist. Ct. Memo, A 11).

On March 27, 1989, Debtor sought another three week extension to file brief to and including April 17, 1989. Either the District Court made a mistake, or for unstated reasons of its own, did not decide this motion.

On or around April 18, 1989, Debtor's counsel found a mistake had been made on the firm's calendar due to the haste in closing down Chicago operations and the extraordinary work load resulting therefrom. The mistake was typical of a number of similar errors made while attempting to deal with the collapse of

the Needler firm.

Attorney Needler, however, promptly prepared and filed a motion to extend time, which was received by the District Court on April 19, 1989. Regrettably, in haste, Attorney Needler requested until April 31, 1989 to file the brief, when, of course, he should have requested May 1, 1989 (there being no April 31st date). (See Attorney Needler's affidavit and Motion to Reconsider for the above facts, A 14-42)

The District Court has expanded the two-day error in filing a fourth request for extension and the April 31st mistake into inexcusable neglect and a dismissal of the appeal. (See Order and Opinion of May 5, 1989 at (A 9-13).

On December 17, 1991, the Court of Appeals affirmed the District Court. In

neither the District Court or Appellate opinions are there any findings on the merits of either the dismissed appeal or of the validity and reasonability of the extension to file brief. The sole ground for refusal of the extension to file brief is that the reasons do not constitute "excusable neglect."

REASONS FOR GRANTING THE WRIT

I.
Introduction

The Court of Appeals decision is in conflict with its own decision in Hanson v. First Bank, 828 F. 2d 1310 (8th Cir. 1987) and also apparently conflicts with the rules of all other circuits regarding the untimely filing of briefs on appeal

in the District Court from bankruptcy orders. Extensive research reveals no case where the "excusable neglect" stan- is applied to the untimely filing of appeals briefs.

The decisions of the Court of Appeals and the District Court at bar do violence to the liberal intention of Bankruptcy Rule 1001 requiring the rules to be construed "to secure the <u>just</u>, speedy, and inexpensive determination of every case and proceeding." (Emphasis Supplied). The courts below fail to consider, in any manner, the type of default involved or how anyone could have been damaged by the delay in filing of the Debtor-Appellant's opening brief. The bankruptcy court and the district court have broad general powers under 11 U.S.C., sec 105 (Section 105 of the

Bankruptcy Code) to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code (and needless to ay its rules). The concept that a district court is limited by an "excusable neglect" standard in allowing the late filing of briefs in bankruptcy appeals is clearly erroneous.

II.
"Excusable Neglect" Is Not The Standard For Extending The Time For Briefing.

At the outset, it should be noted that only the Eighth Circuit now applies a strict standard of "excusable neglect" for the untimely filing of briefs. All other circuits apply either the " good cause shown" standard or the "good faith" standard as outlined below. For this reason alone, this Court should grant this petition--to settle this confusion

of the rules.

Contrary to the opinions below, the district court is given the unreserved power to "specify different time limits" for the filing of appeals briefs by Bankruptcy Rule 8009(a). The standard is one of reasonable fairness, and an abuse of discretion results unless gross negligence, bad faith or indifference have been shown (otherwise known as the "good faith" standard).

The standard is explained in In re Beverly Manufacturing Corporation (Brake v. Tavormina), 778 F. 2d 666 (11th Cir. 1985) as follows at p. 667:

> "Construction of Bankruptcy Rule 8009(a)(1), requiring timely filing of briefs, is a matter of first impression in this circuit. Appellant suggests that we adopt the pos-

ition of the Sixth Circuit, which has held that dismissal is proper only when bad faith, negligence or indifference has been shown. See In re Winner Corp., 632 F. 2d 658 (6th Cir. 1980). We consider this is a better approach, than one of routine dismissal for failure to timely file briefs. First, it is consistent with this circuit's construction of the analogous Federal Appellate Rule, see Fed.R. App. P. 31(c) from which the Bankruptcy Rule has been adapted. See Bankruptcy 8009 (Advisory Committee Note). . . ."

As stated in Collier On Bankruptcy, 1991 ed., sec. 8009.03 Filing and Serving of Briefs, page 8009-4:

"The introductory language to

subdivision (a) permits the district court or appellate panel by rule or order to shorten or extend the relevant time periods, or to excuse entirely the necessity for filing briefs. In certain instances the necessity for quick action may lead to a less formal method of presenting arguments to the court. The Advisory Committee Note to Rule 8009 states that this language "allows local and individual variation" in the filing of briefs. The language clearly permits enlargement by order in a particular case, as well as general applicable variations by rule." Collier's further states at pages 8009-5,6:

"In a bankruptcy appeal if the

> appellant fails to file a brief, the appellee may move the court for sanctions pursuant to Rule 8001(a), which sanctions may include dismissal. The rule is permissive and does not require that the appeal be dismissed in every case in which a brief is not filed on time.[3]"

Also see Hoffman v. Alside, Inc., 596 F. 2d 822 (8th Cir. 1979) holding that sanctions other than dismissal may suffice where a brief is not filed on time, such as taxing costs; and In re Beck-Rumbaugh Associates, Inc., 80 B.R. 306 (E.D. Pa. 1987) holding that a failure to comply with a briefing schedule did not warrant dismissal of an appeal when no harm was caused by the

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[3]Citing In re Beverly Manufacturing Corp., supra.

late filing. However dismissal can result if there is a pattern of dilatory tactics and lateness exhibited by the negligent party. First National Bank of Maryland v. Markoff, 70 B.R. 264 (S.D.N.Y. 1987).

Norton Bankruptcy Law and Practice, 1985 ed., Rule 8009, page 569-570, states:

> "The sanction for noncompliance with the time requirements for the filing of a brief on appeal pursuant to Rule 8009 is not specified by the Bankruptcy Rules. Dismissal is "an especially drastic remedy reserved for 'rare occasions.'"[4] Since the dismissal of any appeal may be as injurious in effect as

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[4]Citing Merker v. Rice, 649 F. 2d 171 (2nd Cir. 1981)

would be the dismissal of a case or proceeding-in-chief, appellate courts should exercise restraint in dismissing bankruptcy appeals because of the failure to file a brief on appeal within the time specified by Rule 8009. Not only do the courts exercise restraint in dismissing proceedings for failure to comply with time requirements, but it has also been held that the exercise of sound discretion requires that lesser sanctions than dismissal be considered.[5] Alternative sanctions, such as costs, may be more appropriate. In the event of dismissal, the dismissing court is also required to articulate the reasons

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[5]Citing Schenck v. Bear Stears & Co., Inc. 583 F. 2d 58, 60 (2nd Cir. 1978.

why "a less severe remedy" than dismissal was not used. Without such an analysis, meaningful appellate review of such decision is not possible.[6]"

The District Court and the Court of Appeals have been deceived by the same argument made by the appellee in In Re Beverly Mfg. Corp., supra, 778 F. 2d at 667:

"Appellee for her part urges that we adopt a stringent rule of dismissal for failure to timely file briefs. She relies upon cases summarily dismissing for failure to timely file notice of appeal (Citing cases). Unlike the filing of briefs, filing notice of appeal is a pre-requisite to jurisdiction and

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[6]Citing In re Mac Meekin, 722 F. 2d 196, 199 (3rd Cir. 1983)

must be strictly construed. (Citing Fase v., Seafarers Welfare & Pension Plan, 574 F. 2d 72 (2d. Cir. 1978). Strict enforcement is crucial to the underlying prompt notice of appeal for without notice both the parties and the court would presume that litigation has ceased. (Citing Fase at 74 F. 2d 75). Filing briefs, however, is not a jurisdictional pre-requisite, nor does it prejudice the parties and the court to a similar degree. (Citing Marcaida v. Rascoe, 569 F. 2d 828 (5th Cir. 1978). Thus, the more flexible standard requiring bad faith, negligence or indifference is appropriate with regard to filing of briefs."

It is amazing the District Court and Court of Appeals in the case at bar

could possibly conclude that the standard of "excusable neglect", used to excuse late filing of appeals and other bar dates, applies to the untimely filing of briefs.

Bankruptcy Rule 9006(b) upon which the lower courts in this case rely, is patterned after Federal Rule of Civil Procedure (FRCP) 6(b)(1)(2). These rules have nothing to do with appellate briefing. They concern the standards of relief for various bar dates which if not observed could conceivably prejudice a party or make uncertain the finality of distributions and other claims.

The correct standards regarding bar dates are set forth in In re Murphy (Menna v. Murphy), 1 B.R. 736 (B.C.S.D. Cal., 1979).

In Murphy, the creditor, Menna,

filed suit against the debtor contesting the dischargeability of a debt. The complaint was dismissed as untimely filed, and the creditor moved for reconsideration and for enlargement of the time to file. The bankruptcy court held that under the circumstances (including the fact that there was only a one-day delay in filing the complaint), that the case involved a serious allegation of fraudulent conduct on the part of the debtor, that the creditor's counsel was not completely inattentive, and that the untimely filing was apparently because of a clerical mistake, and thus there was excusable neglect entitling the creditor to an enlargement of time to file, and also the same factors would permit the bankruptcy court to extend its bar date.

The Court in Murphy said in part at pages 738-739:

"The concept of excusable neglect rather has been construed by the federal courts to be a flexible one, requiring showing of good faith by the party seeking enlargement, a reasonable basis for non-compliance within the specified period, and a lack of prejudice resulting to the opposing party. (Citing cases).

In addition to the foregoing, this Court is mindful of the need that justiciable matters be substantively considered and not be barred by procedural technicalities, unless some important purpose is served. See In re. Magee, 415 F. Supp. 521, 530 (W.D. Mo. 1976). Litigants such as the Plaintiff, moreover, should

not be penalized for the careless behavior of their counsel. (Citing cases). And finally, this Court feels that the excusable neglect requirement of Bankruptcy Rule 906(b)(2) should be liberally construed. See In re. Capshaw, 423 F. Supp. 1388, 1390 (E.D.Va. 1977)."

At bar, there is no bar date involved of any kind. There is a two-day delay in seeking extension to file brief, no failure to file on the extended day requested (despite some inferences to the contrary) and no conceivable prejudice to anyone (there being no stay).[7]

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[7]The District Court did not act on the Fay's third motion to extend time to April 17, 1989, and The Fay's were only two days late with their motion to further extend the time to April 31, 1989. The Fays filed their brief on that day (i.e. May 1, since there was no April 31), by mailing same to the District Court. Bankruptcy Rule 8008(a) provides

As demonstrated by the court in Murphy, the standard of excusable neglect is a flexible one, and the strictness of the standards depends upon what relief is being requested. If finality of judgment is at stake, the standard will be strict and high indeed. If the rights of parties are foreclosed or abrogated by the relief desired, the standard will also be high. If, however, there is no prejudice resulting from the relief, but rather resulting gross injustice if the relief is not granted, then it is unconscionable and an abuse of discretion not to grant the relief.

Accordingly, it should be noted that even were the standard "excusable neglect", debtor at bar qualifies for

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that briefs shall be deemed filed on the date of mailing.

relief. Under the circumstances at bar, the standard of excusable neglect would not be strict and high, but rather sympathetic and liberally construed to do justice.

But as above stated, the standard is not "excusable neglect" because neither finality of judgment or bar dates are involved. Therefore the courts below rely on inappropriate authority.

The District Court relies on In re Overly Hautz Company, 57 B.R. 932 (B.C. N.D. Ohio 1986) for the proposition that the "excusable neglect" standard requires movant to show that the failure to perform was due to circumstances beyond the reasonable control of the person whose duty it was to perform. In Overly-Hautz, the court refused to extend a bar date for claims where the IRS had with-

drawn its original claim and submitted another out of time. The court noted that even if treated as an amendment, the second claim could not be considered because it was subject to an equitable factors test: (i) whether the Debtor and creditors relied on the earlier proof of claim or had reason to know that subsequent proofs of claim would be filed pending completion of an audit; (2) whether other creditors will receive a windfall by the courts refusing to allow amendment; (3) whether the Service intentionally or negligently delayed in filing its proof of claim; (4) the justification for the Service's failure to request extension of the bar date; and (5) whether equity requires consideration of any other factors.

Thus, that court recognized that

relief from the bar date depended on the equitable factors involved in the individual case. Also since there was no evidence that the IRS's failure to request an extension of the bar date was beyond its reasonable control, relief under 9006(b) would not be granted.
The case has absolutely nothing to do with late filing of briefs.

The District Court also relies on Hanson v. First Bank of South Dakota, 828 F. 2d 1310 (8th Cir. 1987), which more clearly states the problem of applying the "excusable neglect" standard, as follows (at 1314):

> "Neither the Bankruptcy Code nor the Rules define excusable neglect. Rather, it is a flexible standard that is subject to interpretation by the trier of fact in each instance.

In re Arosemna, 65 B. R. 246,248 (B.C. M.D. Fla. 1986). A number of courts have interpreted "excusable neglect" as "'meaning the failure to timely perform a duty due to circumstances which were beyond the reasonable control of the person whose duty it was to perform.'" In re Carlton, 72 B.R. 543, 546 (Bankr. E.D.N.Y. 1987) (quoting In re Manning, 4 B.C.D. 304, 30 (Bankr. D. Conn. 1978)); Arosemena, 65 Bankr. at 248. The burden of proving excusable neglect is on the party seeking the enlargement of time. Carlton, 72 Bankr. at 546."

Thus, the Eighth Circuit recognized that the excusable neglect standard was a flexible one (depending on the circumstances of the individual case for its

definition, application and meaning). It also correctly noted that in some cases (where bar dates or other orders and judgments of finality were involved) the movant for an extension of time was held to a strict and high standard of proving that the delay was beyond his reasonable control). This has nothing to do with the untimely filing of briefs, nor does it have anything to do with a number of situations faced by the district and bankruptcy courts as they exercise their original or referred jurisdiction.

Are we to understand that if a large law firm in St. Louis, let's say, mistakenly misses the date for amending a complaint or answer of a large corporate client, let's say a top bank, that the Eighth Circuit will impose a high, strict standard of excusable neglect and require

the court below to dismiss the complaint or render a default judgment? We think not. True, the circumstances might be different where a bankruptcy court bar date is involved. It depends upon what is involved, and particularly whether the principles of finality or prejudice to a party have relevance to the situation.

The District Court also relies on In re Carlton, 72 B.R. 543 (Bankr. E.D.N.Y. 1987). In that case, the bankruptcy court held that it could not excuse an attorney's negligence in answering a complaint one day late, because such did not constitute excusable neglect. The district court at bar, however, did not read very far in the Carlton opinion. The Carlton court refused to enter a default judgment and, because of "anti-thetical considerations" (such as want

of prejudice by the delay, the right to fair trial, and the absence of a pattern of delay or contumacious conduct), allowed the answer to be filed. In other words, the Carlton court found the equities in favor of the defaulting defendant and overrode the strict and high excusable neglect standard it had endorsed.

Where was the District Court in this case when Attorney Needler presented his equitable factors, which far surpassed the mistaken computation-of-time excuse in Carlton?

Again, the Carlton case has nothing to do with the untimely filing of briefs.

Finally, the District Court relied on In re Murphy, supra. For what reason is unclear.

The Murphy court does state that a

heavy workload borne by counsel and the "press of business" will not support a finding of "excusable neglect," since attorneys are "busy most of the time and they must organize their work so as to be able to meet the time requirements of the matters they are handling or suffer the consequences." The cases that set forth this proposition do not envision the virtual collapse of a law firm, but rather contemplate the attorney who is engaging in his normal practice who is not diligent.

On a very similar set of facts to Carlton, the court in Murphy found excusable neglect on a "flexible standard" rather than the "antithetical considerations" in Carlton, and extended the bar date permitting a complaint to be filed.

Clearly, it is all by way of saying the same thing--one way or another a litigant is not to be deprived of his action or defense because of some technicality or minor inadvertence.

The Eighth Circuit Court of Appeals reliance on cases is even more impoverished.

As previously stated, in Hansen v. First Bank, 828 F. 2d 1310-1315 (8th Cir. 1987), the court declared that the excusable neglect standard was a flexible one. It also stated that late filing of a claim or ballot due to employee turnover is not excusable neglect because it is presumed that such is within the reasonable control of the employer. The employee turnover at the Needler law firm (unlike that in the large corporate businesses in Hansen and Arosemena,supra)

was beyond the control of the firm entirely, and provided good reason for "excusable neglect", however inflexibly applied.

In Clinkscales v. Chevron U.S.A., Inc., 831 F 2d 1565, 1569 (11th Cir. 1987), the District Court in a non-bankruptcy case, refused to allow the Plaintiff to file a surrebuttal brief and supplemental affidavit six months after defendant filed his reply brief on the excuse that the Plaintiff's attorney had a busy practice. On any standard, flexible or otherwise, such would not constitute excusable neglect or good cause.

At bar , however, there was no six month delay, but a clear, good faith effort to comply promptly with court rules, and very cogent and good reasons why an

extension should have been granted to file the brief on appeal instanter.

It is to be emphasized that Clinkscales has nothing to do with matters at bar. In Clinkscales there was an effort to redo a case long after it was submitted. No appeal or appeals briefs were involved. The District Court had every right to require a good excuse for not raising all matters in the original briefs, where so long a time had elapsed, and when none was forthcoming to decide the case. The matter was decided under FRCP 6(b), which has absolutely no relevance at bar. The appeal at bar was governed by the bankruptcy appeals rules and not the Federal Rules of Civil Procedure.

Finally, the Court of Appeals relied on Selph v. Council of the City of Los

Angeles, 593 F. 2d 881 (1979). In that case it was held that neither the confusion of moving counsel's offices, which disrupted normal calendaring practices, nor press of business, which "distracted" counsel from filing timely appeal, constituted excusable neglect sufficient to render an extension of time to file untimely notice of appeal under Federal Rule of Civil Procedure 4(a). Federal Rule of Civil Procedure 4(a) has no relevance whatsoever to matters at bar because the untimely filing of a notice of appeal is not involved. (See A 55). The provisions for enlarging time in the Appellate Court are set forth in FRAP 26(b) (A 54). The standard is not excusable neglect but rather "good cause shown". And that tells the story. It is impossible that the standards for the

untimely filing of briefs in the Court of Appeals could be lower than those in the District Court (when sitting as an appellate court in bankruptcy matters). That is why Bankruptcy Rule 8009(a), with its unlimited power to set the time when briefs shall be submitted on appeal in the District Court, controls and not Bankruptcy Rule 9006(b).

III.
Under No Circumstances Should The Courts Have Contributed To The Difficulties of the Needler Law Firm Thus Prejudicing Its Clients, Including Petitioner.

The financial failure of the Needler firm was not a turnover of personnel in the normal course, nor a relocation, nor

a change over. If Attorney Needler had not stuck with it, at considerable sacrifice to himself, and tried in every way to pick up the pieces and prevent harm to his clients, there would have been many fatalities. It was a balancing act, and the only way it could have been accomplished so successfully was with the cooperation of many fine opposing counsel and sympathetic courts.

In January, 1989, William L. Needler & Associates, Ltd. terminated all of its Chicago employees, all its clerical help, all stenographers, all lawyers except Mr. Needler, all paralegals, and closed down its office at 220 South State Street, Chicago, Illinois.

The firm was so financially embarrassed it could not even pay the rent.

It took Attorney Needler over six months before he could settle with the management at 220 South State Street, and get a release of the firm's files, which had been removed from the office premises and heaped up in the basement.

One by one, Attorney Needler confirmed the remaining Chapter 11 cases -- in Western Iowa over 42 farmers confirmed, a 100 percent success record; in Kansas over 25 farmers confirmed, an 80 percent success record; in Minnesota over 20 farmers confirmed, at least a 70 percent success record; and in Nebraska over 40 farmers confirmed, at least an 80 percent success record.

Attorney Needler is understandably gratified with the results, for the alternative was to retire from bankruptcy practice and unfairly leave the problem

for the various courts, bar associations and litigants to unravel--an expensive and difficult undertaking where there is no knowledge of what has gone on before.

This effort in saving farm debtors has involved far more time away from home than at home. Attorney Needler is weary and saddle sore, and does not need this kind of exercise.

This Court should see to it that no litigant is denied his day in court or his appeal because of some minor procedural technicality, inadvertence or confusion that has prejudiced no one.

CONCLUSION

Petitioner, Harlow Fay, Inc., requests this Court to hear and grant its petition for writ of certiorari to the Eighth Circuit Court of Appeals, to reverse and vacate the judgments below dismissing Petitioner's appeal, with instructions to allow Petitioner's brief on appeal to be filed in the District Court and for the District Court to render an opinion and judgment on the merits of the appeal.

Further Petitioner requests whatever other relief this Court deems equitable and just.

Respectfully submitted,

William L. Needler

Record Attorney:
William L. Needler
WILLIAM L. NEEDLER & ASSOCIATES, LTD.,
Airport Road
P.O. Box 177
Ogallala, NE 69153
(308) 284-4505

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-119

In Re: Harlow Fay, Inc., Debtor.	)	Appeal from the United States District Court for the Eastern District of Missouri
Harlow Fay, Inc., Appellant,	)	(TO BE PUBLISHED)
v.	)	
Federal Land Bank of St. Louis, Appellee,	)	

Submitted: November 18, 1991

Filed: December 17, 1991

Before McMILLEN, FAGG and BOWMAN, Circuit Judges.

PER CURIAM.

Harlow Fay, Inc. (debtor), appeals from the judgment of the District Court[1]

[1]The Honorable George T. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

for the Eastern District of Missouri dismissing its bankruptcy appeal for failure to timely file a brief. For reversal, debtor argues that the district court abused its discretion in refusing to excuse the untimely filing on the ground of "excusable neglect." We affirm.

On appeal from the bankruptcy court's dismissal of debtor's Chapter petition, the district court notified debtor that its brief was due on February 23, 1989. The district court granted an extension to March 3, and another to March 27. On March 27 debtor requested another extension to April 17. There is no indication that the district court ruled upon this request, but, in any event, debtor did not file its brief on

April 17. On April 19, debtor submitted its fourth request for an extension of time, to the nonexistent date of April 31. On May 3, debtor lodged its brief with the court. The Federal Land Bank of St. Louis (FLB) moved to dismiss the appeal on the ground that debtor's April 19 request for additional time and its brief were untimely filed.

The district court denied debtor's request for additional time and dismissed the appeal on the ground that debtor failed to demonstrate "excusable neglect" under Bankr. R. 9006(b)(1)(2) and Fed. R. Civ. P. 6(b)(2). Debtor sought reconsideration on the grounds that (1) the district court erroneously stated that debtor had requested a transcript which was not a part of the designated

record; (financial pressures had forced counsel to reduce his staff of attorneys, which resulted in errors; and (3) counsel continued to face problems due to his firm's relocation. The district court denied debtor's motion for the reasons previously stated, with the exception of the reference to the non-designated transcript.

Regardless of the difficulty debtor encountered in obtaining the bankruptcy transcript, debtor's April 19 request for an extension of time to file its brief was untimely, as was its May 3 filling. We therefore conclude that the district court did not abuse its discretion in denying the request for additional time on the ground that debtor failed to establish excusable neglect. See Hanson

v. First Bank, 828 F. 2d 1310, 1314-15 (8th Cir. 1987) (abuse of discretion standard; employee turnover not excusable neglect under Bank. R. 9006(b)(1); Clinkscales v. Chevron U.S.A., Inc., 831 F. 2d 1565, 1569 (11th Cir. 1987) (attorney's busy practice not excusable neglect under Fed. R. Civ. P. 6(b). Cf. Selph v. Council of Los Angeles, 593, F. 2d 881, 883 (9th Cir. 1979)(confusion from moving law office not excusable neglect under Fed. R. App. 4(a)).

Accordingly, we affirm the district court's judgment dismissing debtor's bankruptcy appeal. We deny FLB's pending motion to strike and dismiss as moot its motion to dismiss.

A true copy

Attest: CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
For The Eighth Circuit
U.S. Court & Custom House
1114 market Street
St. Louis, Missouri 63101

Michael E. Gans
CLERK

(314) 539-3600
FTS 262-3600

December 17,1991

Mr. James C. Truax
WILLIAM L. NEEDLER & ASSOCIATES
8 S. Michigan Avenue
Suite 1300
Chicago, IL 60603

Re: 91-119EMH Harlow Fay Inc. vs. Federal Land Bank

Dear Counsel:

Enclosed is a copy of the opinion filed today in the referenced case. Judgement in accordance with the opinion was also entered today.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to insure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing must be received by the clerk's office within the timne set by FRAP 40 (within 14 days of entry of judgment). Petitions for rehearing are not afforded a grace period for mailing and are subject to being denied if not timely received.

Sincerely,

/s/ Michael Gans
Clerk of Court

lmk

Enclosures

cc: Jackie Bailey
William L. Needler
C.E. "Sketch" Rendlen III
Robert St. Vrain

District Court/Agency Case
Number(s): N89-15C

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

NO. 91-1199EMH	*	
	*	Order Denying
In Re: Harlow Fay, Inc.,	*	Petition for Rehearing and Suggestion for Rehearing En Banc
Debtor.	*	
Harlow Fay, Inc.,	*	
Appellant,	*	
v.	*	
Federal Land Bank of St. Louis,	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied. Judge Beam took no part in the consideration or decision of this case.

February 6, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

HARLOW FAY, INC.,	)	
	)	
Debtor.	)	
	)	
HARLOW FAY, INC.,	)	
	)	No. N 89-0015C
Appellant,	)	
	)	
v.	)	
	)	
FEDERAL LAND BANK OF ST. LOUIS,	)	
	)	
Appellee.	)	

ORDER

Pursuant to the memorandum filed on this date herein,

IT IS HEREBY ORDERED that appellant's motion for an extension of time to file its brief in this cause be and it is denied.

Accordingly,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Harlow Fay, Inc.'s appeal be and it is dismissed.

Dated this 5th day of May, 1989.

/s/ George T. Gunn
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

HARLOW FAY, INC.,	)
	)
Debtor.	)
	)
HARLOW FAY, INC.,	)
	)
Appellant,	)
	)
vs.	)
	)
FEDERAL LAND BANK OF ST. lOUIS,	)
	)
Appellee.	)

MEMORANDUM

This matter is before the Court on the fourth motion of debtor-appellant Harlow Fay, Inc. for an extension of time to file its brief on appeal. On December 13, 1988 the United Sates Bankruptcy Court for the Eastern District of Missouri entered an order dismissing debtor-appellant Harlow Fay, Inc.'s petition. On January 12, 1989 appellant

timely filed its notice of appeal. On February 7, 1989 the final designation of the record on appeal was entered on this Court's docket. On February 22, 1989, the date on which appellant's brief was due, it filed a request for extension of time to and until March 13, 1989 to file its brief on appeal. On March 7, 1989 appellant filed a second motion for extension of time requesting an additional two weeks to and including March 27, 1989 to file its brief. This Court granted this motion on March 21, 1989. On March 27, 1989 appellant again sought a three-week extension of time to and including April 17, 1989 to file its brief on appeal. Appellant did not file its brief on April 17, 1989 or seek an extension of time to do so until April 19, 1989. On April 19, appellant filed a

fourth motion for extension of time to and until the non-existent date of April 31, 1989. On May 3, 1989 appellant lodged its brief with the Court.

Appellant has offered various reasons for its persistent delay in filling the brief: change of counsel, relocation of present counsel's offices, difficulty due to the court reporter's illness in obtaining a transcript of a Rule 2004 hearing (which is not presently a part of the designated record on appeal), and confusion in counsel's office as to required filing dates in bankruptcy matters.

Pursuant to Bankruptcy Rule 9006(b)(1)(2) and Federal Rule of Civil Procedure 6(b)(2), the Court may extend the time for filing upon a showing of "excusable neglect." This standard

requires the movant to show that the failure to perform was due to circumstances beyond the reasonable control of the person whose duty it was to perform. In re Overly-Hautz Co., 57 B.R. 932 (Bankr. N.D. Ohio 1986). None of the reasons for delay offered by appellant's counsel satisfies this standard. See Hanson v. First Bank of South Dakota, 828 F. 2d 1310 (8th Cir. 1987); In re Carlton, 72 B.R. 543 (Bankr. E.D.N.Y. 1987); In Re Murphy, 1 B.R. 736 (Bankr. Cal. 1979). Inasmuch as appellant has failed to demonstrate excusable neglect, appellant's request for an extension of time to file its brief on appeal must be denied and this appeal dismissed.

Dated this 5th day of May, 1989.

/s/ George T. Gunn
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

HARLOW FAY, INC.,	)	
	)	
Debtor.	)	No. N 89-0015 C
	)	
HARLOW FAY, INC.,	)	
	)	
Appellant.	)	
	)	
v.	)	
	)	
FEDERAL LAND BANK OF ST. LOUIS,	)	
	)	
Appellee.	)	

MOTION TO RECONSIDER AND VACATE ORDER AND MEMORANDUM OF MAY 5, 1989, FOR ORDER PERMITTING FILING OF BRIEF INSTANTER, AND FOR IMPOSITION OF A STAY UNTIL THIS MOTION CAN BE HEARD AND DECIDED, AND FOR OTHER RELIEF DEEMED EQUITABLE.

NOW COMES HARLOW FAY, INC., by and through its attorneys, William L. Needler & Associates, Ltd., and moves this Court to reconsider and vacate its order (rehear) and memorandum of May 5, 1989 denying Appellant an extension of time to file brief and dismissing this appeal.

Appellant also requests this Court to permit it to file said brief instanter on a showing of both good cause and excusable neglect. Additionally, Appellant requests this Court to impose a stay of the order dismissing Appellant's Chapter 11 proceeding of December 13, 1988 entered by the Bankruptcy Court and of this Court's order of May 5, 1989 dismissing this appeal, until this Motion can be heard and decided and until the Court of Appeals, if necessary has had an opportunity to consider this matter. Finally, Appellant requests any other relief which is equitable and just. In support thereof, Appellant states as follows:

1. There is no question that Appellant has been diligent and is deserving of the relief requested.

2. On May 1, 1989, the Appellant

mailed for filing its opening brief in this matter to this Court. Under the circumstances of this case, entirely beyond the control of the Appellant and its counsel, there was absolutely no possibility that this brief could be submit-submitted earlier; and this brief should be deemed timely filed, even though Appellant's fourth motion for extension of time mistakenly requested April 31, 1989 (a non-existent date) rather than Monday, May 1, 1989 as intended. Even were Appellant's request considered to be for April 30, 1989, and this Court had ordered the brief to be submitted by that date, April 30, 1989 being Saturday, the effective date would be Monday May 1, 1989 since the clerk's office is closed on Saturday and no papers can be filed until Monday. See Bankruptcy Rule 9006.

Even were that not so, Appellant would have a right to request relief under Federal Rule of Civil procedure No. 60(b), and does so, for mistake, inadvertence, etc. This brief was timely as filed on Monday, May 1, 1989 because the Bankruptcy Appeals Rules (Rule 8008) adopt the rule of the United States Supreme Court "except that briefs shall be deemed filed on the date of mailing." This rule evens out the disparity between counsel with their offices on the doorstep of the courthouse and those who operate at a distance, and facilitates filing and service on the same day as envisioned by Rule 8009. The dilemma is easily perceived. If the rule were not as it is, there would be service required before the date due from a practitioner with offices at a distance from the

courthouse, since a certificate is required for filing that the parties have been duly served. It is, of course, not essential that the court receive a brief on a specific due date, since no immediate action is required upon it -- so that the rule for briefs in the Supreme Court of the United States deeming briefs to be filed on the date of constructive service (mailing) works well in practice. There can be no question that the rules are designed to assist as far as is possible the practitioner who operates from a distance, since this also encourages a specialization which the Supreme Court, for one, is anxious to promote in complex areas such as bankruptcy. Also, there is a long-standing due process argument that has never really been resolved to the effect that there is an impermissible

procedural disadvantage where actual, rather than constructive filing, of papers is not allowed. Appellant asserts this constitutional argument should it be the position of this Court, contrary to the Bankruptcy Code, that briefs must actually be filed on the date ordered rather than constructively filed. Appellant submits that Appellant's brief was timely filed pursuant to its fourth motion for extension of time to file brief.

3. As stated by this Court, the final designation of the record on appeals was entered on this Court's docket on February 7, 1989. However, this Court errs when it states that Appellant has offered as a reason for extension of time a difficulty "due to the court reporter's illness in obtaining

a transcript of a Rule 2004 hearing (which is not presently part of the designated record on appeal"). It is true that the transcript for the 2004 hearing is not designated, and it is also not needed for appeal. The Appellee objected to its inclusion and Appellant has not used any part of it on appeal. Actually, the Appellant was glad to have Appellee's assurance that the 2004 hearing should not be part of this appeal, since as far as Appellant is concerned the matters there were simply cumulative and not decisive. The transcript that Appellant had difficulty in obtaining, due to the reporter's illness, was that of the hearing on December 13, 1988 wherein the Bankruptcy Court had dismissed Appellant's Chapter 11 case. This transcript was needed for

appeal and is required under the rules. As substantiated by the affidavit of Appellant's counsel, this transcript was not obtained until Saturday, April 22, 1989 and Appellee's brief was mailed on Monday, May 1, 1989, nine days later, on the first business day when a copying service could be employed to reproduce it after final drafting on Saturday, April 29, 1989. A copy of the transcript of December 13, 1989 has been served upon Appellee's counsel.

4. It is true that considerable confusion has surrounded this transcript. In the first place, William L. Needler was forced by circumstances to assign the details of this appeal to his then assistant, Attorney James C. Truax, who was not entirely familiar with all that had transpired below. In particular, Mr.

Truax labored under the misapprehension that the main evidentiary hearing that took place on November 15, 1988 was read into, merged and made a part of the final hearing of December 13, 1988. This misapprehension was reinforced by the fact that Mr. Truax received two tapes indicating a very lengthy hearing. (Actually, the hearing started near the end of the first tape and used only a portion of the second tape). Since Mr. Truax left the firm on February 15, 1989 and was not being paid thereafter, and the tapes were ordered by letter of February 6, 1989 and not received until after Mr. Truax's official departure, there was no reason to believe that the tapes did not include the evidentiary hearing. The law firm of William L. Needler & Associates, Ltd. would empha-

size that it deeply regrets the loss of Mr. Truax and its other personnel in Chicago, and that such loss was entirely beyond the control of the firm, its personnel or anyone else. (See affidavit of William L. Needler attached). In order to conserve costs in this bankruptcy case, rather than have this evidentiary transcript of November 15, 1988 reproduced in full, that those portions be supplied which would settle any dispute of facts in the few arguments involved. Appellant, however, is confident that there is no fact recited in its opening brief which is disputed.

5. As stated, this Court granted Appellant's second motion for extension of time to file brief to and including March 27, 1989. So far so good. When however, Appellant could not meet this

date, Appellant timely filed on March 27, 1989 third motion for extension of time to and including April 17, 1989 to file its brief on appeal. Technically, because this Court had entered no order permitting the filing of Appellant's brief on or before April 17, 1989, there was nothing to enlarge and Appellant's fourth motion for extension of time merely served as an amendment to its third request, so that Rule 9006 did not apply. The fact that there was confusion on the docket of Appellant's attorney and said fourth motion was mailed by Express Mail late in the evening of April 17, rather than received on that date by this Court is not debilitating, since good cause is the standard and not excusable neglect. But the fact is the Rule 9006 does not apply at all.

6. Bankruptcy Rule 8009 specifically gives this Court the power to set different time limits in the filing of briefs, and this power is not restricted by the general time limitations set forth in Rule 9006. The only standard is abuse of discretion which would occur where good cause is shown. This has to be true, for, with all due respect, to imagine that the standard for extending the time for submitting briefs in a bankruptcy appeal is different in this Court than it is in the Court of Appeals is preposterous. The Court of Appeals for good cause shown may permit an act to be done after the prescribed time (F.R.A.P. 26 (b)). The Rules in Part VIII of the Bankruptcy Rules are patterned after the Federal Rules of Civil Procedure, and these rules should be consulted when

construing the Bankruptcy Rules as a whole in their application to the Appeals Rules contained in Part VIII. In relation to the time for filing briefs, the Bankruptcy Rules (8009) give this Court unlimited discretion in the matter of when briefs should be filed (otherwise the rules would have made plain that extension of time for filing briefs may be had on good cause shown both before and after the expiration of the time set). Abuse of discretion would therefore be the only standard (or good cause shown).

7. All of the reasons for delay set forth by counsel for Appellant are cogent and not only provided good cause of extension but also constitute excusable neglect. Appellant's counsel supplied his affidavit to underscore and make more

indelible the good and sufficient grounds for extension to file brief and to allow Appellant's opening brief to be filed instanter. This Court has correctly stated that the excusable neglect standard is "beyond the reasonable control of the person whose duty it was to perform." In any event, Appellant has shown good cause, and that is all that is necessary.

8. As this Court points out, the final designation was filed by Appellant on February 7, 1989. This designation contained a request for the transcript of December 13, 1989 which was the hearing wherein the Bankruptcy Court announced its reasons for dismissing the Chapter 11 proceeding. Rule 8006 requires the inclusion in the record of any opinion, findings of fact and conclusions of law of the court (and such are invariably

contained in the transcript of proceedings where the action is taken). Such is the case at bar. Due to circumstances entirely beyond the control of Appellant's counsel, the transcript could not be procured until Saturday, April 29, 1989. We would not again employ someone in Chicago to transcribe tapes of a hearing in another jurisdiction, since that person is not aware of the local rules and other details that make the process go smoothly. However, the suggestion of the Clerk was to handle the matter as it has been handled. Of course, no one could know that the Court Reporter would become ill and fall so far behind in her work due also to a surprise onset of emergency matters that she would be unable to perform as promised. This was all beyond the control of Appellant's

counsel.

9. Additionally, the staff of counsel for Appellant has temporarily and suddenly been reduced to one lawyer where there were four before. Mr. Needler has been working almost steadily fourteen hours a day, seven days a week, to handle the situation, and while relief is in sight there could in the interim be considerably more than the usual number of foot faults and errors develop. All of this was entirely beyond the control of Appellant or its counsel, and consists largely of the inability of clients due to the draught conditions that have swept the midwest -- and the corresponding necessity to at once reduce overhead by dispensing with the Chicago office and most all of its personnel. (See affidavit attached).

10. As demonstrated in the brief received by this Court, there is a likelihood that Debtor-Appellant would prevail on appeal in this matter were this Court to vacate its order dismissing this appeal and hear the appeal. Upon filing of the brief, it had been Appellant's intention to seek a stay in the bankruptcy court with the brief demonstrating the likelihood of Appellant's prevailing. However, it is not now possible to seek such a stay in the bankruptcy court due to the dismissal of the case. Consequently, in exercise of its original jurisdiction under 28 U.S.C., sec. 1334 and its Appellant jurisdiction under 28 U.S.C. 158 and Bankruptcy Rule 8005, Appellant requests this Court to (a) enter a stay of its May 5, 1989 order dismissing this appeal until

this Motion can be heard and decided and for an additional 15 days until an appeal and stay order can be presented to the Court of Appeals, and further impose a stay of the order dismissing Appellant's Chapter 11 case, entered December 13, 1989, also for the time above mentioned. Clearly, the balance of harm tips in Appellant's direction, since its loss of property and livelihood resulting from no stay would far outweigh a short delay in foreclosing by Appellee. Moreover, public policy would favor a stay since it is in the public interest to preserve the family farms and the American farm system, not destroy it.

WHEREFORE, Appellant Harlow Fay, Inc. requests this Court to enter an order granting the following relief:

a. Reconsider, vacate, alter,

amend and modify its Order and Memorandum of May 5, 1989 and grant Appellant the right to file its brief instanter;

b. Impose a stay of the order dismissing Appellant's Chapter 11 proceeding of December 13, 1988 by the Bankruptcy Court and a stay of this Court's order of May 6, 1989 until this Motion can be heard and decided, and if necessary, for 15 days thereafter until the Court of Appeals has had an opportunity to consider this matter.

c. For any other relief that is equitable and just.

Respectfully submitted,

/s/ William L. Needler

A F F I D A V I T

William L. Needler, an attorney, on oath deposes and says:

1. Affiant is counsel for Debtor-Appellant in this cause. Counsel is President and senior attorney for the firm that bears his name, William L. Needler & Associates, Ltd.

2. Affiant is one of the more well-known attorneys representing farm debtors in Chapter 11 proceedings in many jurisdictions. Affiant has testified before the Senate Subcommittee that considered Chapter 12 legislation and his opinion is valued and followed. In re Timbers of Inwood Forest Associates, Ltd., 808 F. 2d 363 (5th Cir. 1987) at pages 365 and 367, footnotes 3 and 7.

The Needler firm practices in some 20 jurisdictions and has handled or is handling over 200 Chapter 11 reorganizations of farmers. Affiant states that you can count the unsuccessful reorgani-

zations of farmers he has participated in on two hands, and has just been congratulated by the bankruptcy judge in Iowa on confirming his thirtieth Chapter 11 case in that jurisdiction.

3. Needless to say, the Needler firm has encountered militant resistance from lenders -- including the Federal Land Bank of St. Louis (now Farm Credit System of St. Louis), the Appellee in this case. It is the thinly-disguised ambition of the Appellee to eliminate the Needler firm if it can as an unwelcome burr under its saddle.

Unfortunately, the Needler firm was unable to win elimination of the "absolute priority" rule in Norwest Bank v. Ahlers, 108 S. Ct. 963 (1988), but it continues to work on and around this problem. Affiant is gratified to report

that the Needler firm's assessment and theory of the Ahlers case has proven accurate. During the time the case was being litigated, the Ahlers recovered and they have made the substantial profits predicted by the Court of Appeals. The Ahlers were therefore in a position to settle with the Ahlers' secured creditors and their Plan is now finally confirmed. The Ahlers were not dying farmers and the so-called "elixir" which, according to the bankruptcy court, the Needler firm was supposed to be selling to the Anlers' turned out to be sweet and effective. The Supreme Court congratulated the Needler firm in Ahlers on its eloquent defense of farmers. See portion of brief attached to which the Supreme Court referred).

5. Affiant regards the work of the

Needler firm to be in great part a public service and the Needler firm has over two million dollars in receivables due from its farmer clients to prove it. The Needler firm has never jeopardized the reorganization effort of a farmer by requiring its fees as part of the confirmation process. However, the time comes when the Needler firm must require reasonable payments from those who can pay in order to stay in business and serve other farm debtors with more complex problems.

6. Unexpectedly, a serious draught plagued the Midwest early this year, affecting many of the Needler firm's clients (its practice is almost entirely limited to serving farm debtors in Chapter 11 reorganization proceedings). While it does do an occasional Chapter

12, these are usually handled and can be handled by the average local practitioner. The draught meant that many of the Needler firm's clients were unable to pay and the Needler firm temporarily ran out of funds. This meant that the Needler firm had to close down its Chicago operation on February 15, 1989 and with great reluctance and regret dispense with most of its personnel including the three lawyers that assisted Mr. Needler. One of these was Mr. Truax, who was handling the appeal in this case. There was confusion resulting from the lack of personnel as to the due date of April 17 (extension was no properly docketed).

7. Affiant at first did not quite understand the significance of the tapes of proceedings which had been ordered and that he was to hire some court reporter

in Chicago to created a transcript of proceedings. When affiant understood what was involved, he immediately conveyed the tapes to Ms Carol Raber, an extremely fine court reporter who could ordinarily make very short shrift of the task. However, due to an illness coupled with an unexpectedly sudden flood of emergency matters, Ms. Raber was unable to keep her commitment and affiant had to apply for successive further extensions. As affiant understands it, the record should not have been conveyed to this Court until the transcript was filed and in the record. However, since the record had been conveyed, it seemed to affiant that the proper procedure was to request successive extensions of time under the circumstances. Certainly this, coupled with affiant's unfamiliarity with the

procedure of having taped transcriptions transcribed, should bear heavily on whether there was excusable neglect at bar, if that be the standard.

8. The Needler firm's move to Ogallala, Nebraska and Northbrook, Illinois is still not entirely completed and there are many continuing problems to face. Most all courts have been very cooperative and have endeavored to grant whatever extensions of time have been requested by the Needler firm so that its clients would not be foreclosed because of no fault of their own and because of circumstances beyond the control of their attorney.

9. To give this Court some idea of the logistics involved, the Needler firm, as previously stated, received the transcript from Ms. Raber on Saturday,

April 22, 1989. On Monday, affiant was in Ogalalla, Nebraska preparing for trial in In re Liebrandt to take place on April 25 and 26. Affiant had enlisted the services of a former attorney in the firm to assist in the preparation of the brief in this appeal. April 25 and 26 were primarily spend in preparing settlement documents in Liebrandt supra which did not go to trial after all. Additionally, on April 25, 26 and 27, affiant put out fires in the following cases: Brakhahn, Johnson, Knapple, Barger, McDowell, Opine, Allemand, Hilton, Ziebarth, Kvamme, Lewis, Duncan, and Kinnan; and on the afternoon of the 27th drove part of the way to Topeka to attend a 341 meeting on April 28 in In re John Johnson. On April 28 and 29, affiant put out fires in Heitheusen, John Johnson,

Bairn, Opine, Couchman, Squires, Ziebarth, Reiger, McDowell, Foster and Smith,, and then flew to Chicago on the evening of April 29. On April 30, finally reviewed the brief herein and prepared for important settlement negotiations in Chicago Bank of Commerce v. Amalgamated Trust & Savings Bank in Chicago. Affiant also prepared other documents in this case attendant to the filing of the brief. On May 1, after settlement negotiations in Chicago Bank of Commerce, supra, affiant flew to Sioux Falls, S.D. for trial on May 2 at 9:00 a.m. in First Bank v. Marvin & Ellen Speck. Affiant has been similarly totally engaged since February 15, 1989 when the closing of the Chicago office and the loss of its personnel occurred, and in any event required the extensions.

10. If called, affiant can swear to the truth of the above.

/s/ William L. Needler

Subscribed and Sworn to
this 13th day of May 1989

/s/ Hugh Dunlop, Jr.
Notary Public
Comm. Ex. 3-21-90

(Note: Attached to Mr. Needler's affidavit are pages 8 through 11 of Respondent's brief in this Court in Norwest Bank v. Ahlers, 108 S. Ct. 963 (1988), as follows:

"Another drawback of Chapter 12 is the continuing jurisdiction of the Court and its Trustee over the affairs of the debtor, which is not only very costly, but unduly restricts debtor's capacity to run his business in the normal course.

This Court should not be misled by the inferences of Petitioners and the Solicitor General that Chapter 12 with its elimination of the

absolute priority rule is a viable alternative for farmers.

Farm debtors cannot afford an absolute priority rule that defeats their reorganization efforts before they start.

As stated in the Federal Reserve's Agricultural Letter, July 3, 1977, p. 2 (App. 3a), there was a rapid escalation of farmland values throughout the Midwest between 1970 and 1980 and a corresponding increase in debt. Farmland prices which had soared twelve-fold between 1950 and 1980 climbed four-fold between 1970 and 1980 in the Seventh Federal Reserve District. Farmland prices and all other farm prices were permitted to rise drastically in the face of radically increasing

demands for farm products. (Outlook, Wall Street Journal, Mon. Aug. 26, 1985).

As conceded by the Federal Reserve, "U.S. domestic agricultural and macro-economic policies inadvertently enhanced export opportunities of other nations," and the situation "was further exacerbated by domestic macroeconomic policies that contributed to the rising exchange value of the dollar.") Letter, p. 2, App. 4a,a).

As worldwide demand grew, inflation soared and interest rates rose to high double digits. The government told farmers to farm fence-to-fence to feed a hungry world and at the same time advised farmers that costly new machines and

methods could greatly enhance production and profits. Farmers were advised that they would perish if they did not keep up with the times. Lenders, government and agricultural suppliers urged farmers to expand and improve their operations or perish. Farm debt grew from $50 billion in 1970 to $200 billion in 1985. (See Time Magazine, 2/18/85, p. 27-8).

All of this was made possible by the government's change of lend-lending rules in 1971. In 1971, the government stopped making farm loans on a farm's ability to repay from cash flow on its operations and instead started to lend on the highly inflated and inflatable market value of the farm. (Wall Street Journal,

Review and Outlook, p. 22, 12/6/85)

Left out of the Federal Reserve's analysis are the facts that the government was not just partly responsible for the present farm crisis but almost entirely responsible for it.

By 1980, Congress had authorized farm loans up to an irresponsible 97% of those obviously inflated market values. (Wall Street Journal, Review and Outlook p. 22, 12/6/85.

It was an old story. Farmers, who for generations had been taught by their fathers to beware of implement salesmen who advised farmers to go modern or go bust, were now assured by the government and the nation's most influential and respec-

ted lenders and agricultural leaders that a farmer would be left behind if he did not modernize and expand.

In 1981, the bubble burst when world-wide glut slashed demand for U.S. Farm products abroad due to U.S. "macroeconomic policies."

Prices fell drastically and precipitously. Suddenly , without warning, farmers could not make enough from crop sales to cover repayment of their loans. As farmers were forced to sell their equipment, livestock, and land to meet loan payments, prices dropped even further and the financial crisis became a nightmare. Over time, at least one-fourth of the nation's grain farmers found they had little or no equity in their land and many

found that they had large deficiency claims against them. As of January 1987, over forty-six (46%) percent of all U.S. farmers had a negative or zero cash flow (See Brief of the States, p. 1- 3; Time Magazine, 2/18/85, p. 28).

The farm credit system admits it is insolvent and has received a government bailout in the billions to meet its commitments and assist farm debtors. Forty-two (42%) percent of the Department of Agriculture's Farmers Home Administration loans in Nebraska were delinquent and thirty (30%) percent of Iowa farmers with less than $800,000 in assets were behind in their payments as of February, 1985 (Chicago Trib-

une, Monday, February 4, 1985, "Bank Failure Tightens Noose on Rural Town.") The number of farm foreclosures escalated dangerously through 1986. Over 70,000 farms were lost in 1986 alone. The view that, if a farmer does not have the support of the secured creditors in a consensual reorganization, he cannot reorganize, reached full flower largely through the astounding influence of lenders and their governmental supporters.

The Ahlers are not governmental or private financial experts or lenders, captains of industry, Philadelphia lawyers, or agri-business leaders all of whom possess the means and capability of forecasting prudent courses of economic conduct.

They are plain folks who must depend upon prominent persons in their community and the government for guidance. They have especially depended on the Federal Land Bank , Norwest Bank, and the U.S. government to assist them, to forebear, to deal fairly with them in time of need and to help them through. That is the least they had a right to expect when they were caught up in a crisis not of their own making, but one entirely created by those who now demand their demise. It is incomprehensible that Norwest and the Federal Land Bank would prefer disastrous liquidation losses rather than performing loans on their books when the tide appears to have turned and farmers' (like the Ahlers')

chances of reorganizing to the benefit of all of their creditors seem brighter. Equity is all on the side of the Ahlers. In no court has this been denied by the Petitioners.

If the government, agri-business, and lenders could be held in tort for their negligence and irresponsibility in creating the present farm financial crisis, the Ahlers and other farmers like them would be owed many billions of dollars.

The Ahlers do not ask for redress. They ask for an opportunity to pay their creditors a reasonable and fair amount through the process of reorganizing their affairs under Chapter 11, rather than deserting their creditors and

canceling their losses in a Chapter 7 proceeding. It is ironic that the government and Petitioners suggest an interpretation of the absolute priority rule that prevents the Ahlers from doing what is moral and right."

* * * * * *

On May 18, 1989, Appellant mailed for filing the following Amendments to its Motion To Reconsider, Etc. (above):

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

HARLOW FAY, INC., Debtor.	)	
HARLOW FAY, INC., Appellant,	)	No. N 89-0015 C
v.	)	
FEDERAL LAND BANK OF ST. LOUIS, Appellee.	)	

AMENDMENT TO MOTION TO RECONSIDER AND VACATE ORDER AND MEMORANDUM OF MAY 5, 1989 (REHEARING), FOR ORDER PERMITTING FILING OF BRIEF INSTANTER, AND FOR IMPOSITION OF A STAY UNTIL THIS MOTION CAN BE HEARD AND DECIDED, AND FOR OTHER RELIEF DEEMED EQUITABLE

NOW COMES HARLOW FAY, INC., by and through its attorneys, William L. Needler & Associates, Ltd., and amends and supplements its Motion to Reconsider and Vacate Order and Memorandum of May 5, 1989 (grant rehearing), which denied Appellant an extension of time to file brief and dismissed this appeal, as follows:

1. There is a garble on page 3 of the motion which should read: "Also, there is a long standing due process argument that has never really been resolved to the effect that there is an impermissible procedural disadvantage where constructive filing of papers is not allowed in the face of a rule or law permitting such filing."

2. At page 6 and 7 of the Motion, it is erroneously stated that the Rules in Part VIII of the Bankruptcy Rules are patterned after the Federal Rules of Civil Procedure. The sentence should read: "The Rules in Part Viii of the Bankruptcy Rules are patterned after the Federal Rules of Appellate Procedure, and these rules should be consulted when construing the Bankruptcy Rules as a whole in their application to the Appeals

Rules contained in Part VIII.

3. Finally, Paragraph 10 on page 9 should be supplemented and clarified to read that Appellant would be irreparably and irrevocably harmed if a stay is not granted, since its business would be destroyed if a foreclosure of the land were permitted.

WHEREFORE, Appellant requests that its Motion to Reconsider and Vacate Order and Memorandum of May 5, 1989 (Rehearing), etc. be amended in the above particulars, and that the typographical error in the prayer of said Motion referring to this Court's order as entered on May 6, 1989 be corrected to May 5, 1989.

Respectfully submitted,

/s/ William L. Needler

STATUTORY APPENDIX

BANKRUPTCY RULE 8008(a)

(a) Filing. Papers required or permitted to be filed with the clerk of the district court or the clerk of the bankruptcy appellate panel may be filed by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs shall be deemed filed on the day of mailing. An original and one copy of all papers shall be filed when an appeal is to the district court; and an original and three copies shall be filed when an appeal is to a bankruptcy appellate panel. The district court of bankruptcy appellate panel may require that additional copies be furnished.

BANKRUPTCY RULE 8009(a)

(a) Briefs. Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:

(1) The appellant shall serve and file a brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007.

(2) The appellee shall serve and file a brief within 15 days after service of the brief of appellant. If the appellee has filed a cross appeal, the brief of the appellee shall contain the issues and argument pertinent to the cross appeal, denominated as such, and the response to the brief of the appellant.

(3) The appellant may serve and

file a reply brief within 10 days after service of the brief of the appellee, and if the appellee has cross-appealed, the appellee may file and serve a reply brief to the response of the appellant to the issues presented in the cross appeal within 10 days after service of the reply brief of the appellant. No further briefs may be filed except with leave of the district court or the bankruptcy appellate panel.

BANKRUPTCY RULE 9006(b)

(b) Enlargement.

(1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of

court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

(2) Enlargement Not Permitted. The court may not enlarge the time for taking action under Rules 1007(d), 1017(b)(3), 1019(2), 2003(a) and (d), 7052, 9015(f), 9023, and 9024.

(3) Enlargement Limited. The court may enlarge the time for taking action under Rules 1006(b)(2), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to

the extent and under the conditions stated in those rules.

FEDERAL RULE OF CIVIL PROCEDURE 6(b)(2)

(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within specified time, the court for cause shown may at any time in its discretion

(1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or

(2) upon motion made after the expiration of the specified period permit the act to be done where failure to act was the result of excusable neglect, but it may not extend the time for taking any

action under rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b) and 74(a), except to the extent and under the conditions stated in them.

FEDERAL RULE OF CIVIL PROCEDURE 60(b)(1)

RULE 60. Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect;

FEDERAL RULE OF APPELLATE PROCEDURE 31(c)

(c) Consequences of Failure to File Briefs. If an appellant fails to file a brief within the time provided by this rule or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.

FEDERAL RULE OF APPELLATE PROCEDURE 26(b)

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for

allowance or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the U.S. except as specifically authorized by law.

FEDERAL RULE OF APPELLATE PROCEDURE 4(a)(5)

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise

requires. Notice of any such motion which is filed after the expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Supreme Court, U.S.
FILED
JUN 4 1992
OFFICE OF THE CLERK

(2)

No. 91-1800

THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

IN RE: HARLOW FAY, INC.,

Debtor.

HARLOW FAY, INC.,

Petitioner,

v.

FEDERAL LAND BANK OF ST. LOUIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

Attorney for Respondent:

Charles E. "Sketch" Rendlen, III
RENDLEN, RENDLEN, REDINGTON and BASTIAN, P.C.
800 Broadway
P.O. Box 1255
Hannibal, MO 63401
(314) 221-4060

(Attorney of Record)

LIST OF PARTIES

The parties to this action are as follows:

The Petitioner is Harlow Fay, Inc., Box 102, LaClede, Missouri 64651.

The Petitioner's Attorney in this Court and below is William L. Needler of William L. Needler & Associates, Ltd., Airport Road, P.O. Box 177, Ogallala, Nebraska 69153, Phone (308) 284-4505; and 8 South Michigan Ave., Suite 1300, Chicago, Illinois 60603, Phone (312) 236-4505.

Below Petitioner was also represented by local counsel: Jackie Bailey, 116 West Ritchie, Marceline, Missouri 64658.

The Respondent is Federal Land Bank (Farm Credit Bank) (AgriBank, FCB), 1415 Olive St., St. Louis, Missouri 63101.

The Respondent's Attorney is Charles

E. "Sketch" Rendlen, III, P.O. Box 1255, 800 Broadway, Hannibal, Missouri 63401.

An interested party is Farmers Home Administration, #1 Fairground Road, Brookfield, Missouri 64628.

Farmers Home Administration is represented by the U.S. Attorney, United States Court House, 1114 Market St., St. Louis, Missouri 63101.

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STATEMENT OF THE CASE

Appellant-Petitioner, Harlow Fay, Incorporated defaulted with respect to a confirmed Plan under 11 U.S.C. Section 1112(b)(8) of the Bankruptcy Code and his Chapter 11 proceedings were dismissed (Appellant-Petitioner's Appendix 1). Debtor had been ordered to submit a Modification to his Plan no later than December 6, 1988 (Appellant-Petitioner's App. 2). Debtor failed to prepare and submit the Modifications (Appellant-Petitioner's App. 3). Debtor attempted to file an untimely Modification almost a week later, and on December 13, 1988 attempted to modify the Modification (Appellant-Petitioner's App. 3). Debtor's untimely efforts to modify became moot with the dismissal of the Chapter 11 on December 13, 1988 (Appellant-

Petitioner's App. 1).

Debtor appealed to the U.S. District Court on January 12, 1989 The Brief of the Debtor, now Appellant-Petitioner, was due February 22, 1989. On February 22, 1989, Appellant-Petitioner filed a request for an Extension of Time in which to file his Brief. A three week extension was granted, to and until March 13, 1989.

On March 7, 1989, Appellant-Petitioner filed a second Motion for an Extension, this time requesting an additional two weeks. This Motion was also granted, giving Appellant-Petitioner until March 27, 1989 to file its Brief.

On March 27, 1989, Appellant-Petitioner filed yet another Motion requesting an extension until April 17, 1989 to file his Brief. This Motion was also granted. April 17, 1989 passed

without word from Appellant-Petitioner, but two days later Appellant-Petitioner sought another extension of time in which to file his Brief. Appellant-Petitioner's Fourth Request for an extension of time was to the non-existent date of April 31. Appellant-Petitioner filed a Brief May 3. The Appellee (FLB) filed a Motion to Dismiss. The District Court denied this untimely Motion and dismissed Debtor-Appellant's Appeal on May 5, 1989. (Appellant-Petitioner's Appendix 9)

Appellant-Petitioner's Motion to reconsider the dismissal was denied. Appellant-Petitioner's Motion for a stay pending Appeal was denied. Appellant-Petitioner filed a Notice of Appeal in the District Court Clerk's office January 15, 1991. Appellant-Petitioner failed to follow the Rules regarding preparation of

the Record and Appendix in this case (Appellant-Petitioner's App. 4).

United States Court of Appeals for the Eighth Circuit affirmed the Judgment of the District Court dismissing the bankruptcy Appeal for failure to timely file a Brief. In Re Harlow Fay, Inc. (Harlow Fay, Inc. v. Federal Land Bank of St. Louis, 951 F.2d 175 (8th Cir. 1991) A Petition for Rehearing was denied February 6, 1992.

ARGUMENT

I. THERE IS NO CONFLICT OF DECISIONS

The issue in this case is narrow and unique to its facts no amount of rhetoric can transform it into one meriting certiorari. The Appellant-Petitioner claims that the Opinion of the Court of Appeals is in conflict with Harrison v. First Bank, 823 F.2d 1310 (8th Cir. 1987).

This does not appear to be the case. Harrison is consistent with the findings here where excusable neglect was not found when there was turn over of staff in the lawyers office which caused the neglect to occur. In Harrison, only one deadline was missed which was not sufficient to rise to the level of excusable neglect. Here many deadlines were missed. There is no logical way Appellant-Petitioner can claim excusable neglect.

The argument of Appellant-Petitioner that no case where the "excusable neglect" standard is applied to the untimely filing of Appellant's Brief may be due to the fact that jurisdictional requirements mandate a Motion be before the Court to allow the filing of a late Brief. That did not occur in this case because the May 3 Brief filing was beyond the third

requested extension of April 17, which was not acted on, also beyond the 4th Request for Extension of Time to file the Brief to April 31 which was filed two days after the April 17th requested extension. Deadlines were missed repeatedly by the Appellant-Petitioner which he admits in his Brief.

> A. Appellant-Petitioner, after four requests for Extensions of Time, two of which were granted, still failed to timely file a Brief on his Appeal from the Bankruptcy Court.

The Bankruptcy Court and the District Court have the power to dismiss the Chapter 11 proceeding in Bankruptcy. This is conceded by Appellant. The central issue is whether these two Courts abused their discretionary powers by dismissing the Appeal of Appellant-Petitioner. The answer to this is no.

This case has a long history of delay

and dilatory conduct on the part of the Appellant-Petitioner and his counsel. In light of these delays and dilatory conduct, and because Appellant-Petitioner's counsel can show no "excusable neglect", the District Court properly dismissed the Appeal in this case and denied a Motion to Reconsider. The Court of Appeals affirmed the dismissal.

Appellant-Petitioner's Petition in Bankruptcy Court was dismissed on December 13, 1988, following a Hearing before the Honorable David P. McDonald, U.S. Bankruptcy Judge. The record of that Hearing shows that Appellant-Petitioner was required to file a Modification to his confirmed bankruptcy Plan no later than December 6, 1988. An Affidavit sworn to by attorney Needler on December 11, 1988 admits that Appellant-Petitioner failed to

file the Modification in a timely manner. Counsel for Appellant-Petitioner admitted in the Hearing of December 13 that he planned to file a further Modification regarding Federal Land Bank, but no such Modification was ever filed of record nor has it been offered. Further, the untimely Modifications proposed by Appellant-Petitioner in the December 13 Hearing were such that the Bankruptcy Judge rejected them outright by dismissing the case, an act clearly within the discretion of the Court.

One month later Appellant-Petitioner timely filed his Notice of Appeal to the District Court. His Brief was due February 22, 1989. On that date, Appellant-Petitioner requested a three week extension of the filing deadline. His request was granted. Six days before

the Brief was due, on March 7, 1989, Appellant-Petitioner requested another extension of the filing deadline, this time to March 27, 1989. Request granted. On March 27, 1989, Appellant-Petitioner again requested a three week extension of the deadline to April 17, 1989.

Appellant-Petitioner's Brief was now due on April 17, 1989. That date came and went without word from Appellant-Petitioner.

Two days later, on April 19, 1989, Appellant-Petitioner again prayed for an extension - this time to the nonexistent date of April 31, 1989. This request was not timely filed and was denied by Order of the Honorable George Gunn, District Judge, dated May 5, 1989. This same Order dismissed Appellant-Petitioner's Appeal. On December 17, 1991, the Court of Appeals

affirmed the District Court.

Appellant-Petitioner ran out of time. He failed to follow the rules. Federal Rule of Civil Procedure 6 and Bankruptcy Rule 9006 authorize the Court to enlarge the time required for cause in the discretion of the Court, "if the request therefore is made before the expiration of the period originally prescribed or as extended by a previous Order." Appellant failed to timely seek his fifth extension but claims abuse by the Courts.

Appellant-Petitioner argues in his Motion to Reconsider that a Brief filed May 3rd should be considered timely filed when the extension requested was to last until April 30th (31st). Appellant-Petitioner ignores the fact that no such extension existed. The Brief, thanks to three prior Extensions of Time, was due

April 17.

> B. Appellant-Petitioner failed to show excusable neglect as required by Bankruptcy Rule 9006(b)(1)(2) and Federal Rule of Civil Procedure 6(b)(2), and has shown no good cause for his dilatory conduct.

Appellant-Petitioner claims his untimely filings and dilatory tactics should fall under the absolution of "excusable neglect." There is no merit to this claim.

"The excusable neglect standard is intended to be a 'strict one'. Chipser v. Kohlmeyer and Company, 600 F.2d 1061 (5th Cir. 1979). The Fifth Circuit, in Chipser, restricted the use of "excusable neglect" to unique circumstances, such as the "failure to learn of the Entry of Judgment." Id at 1063. There is nothing unique about Appellant-Petitioner's circumstances that warrants reversal due

to counsels "excusable neglect."

Counsel for Appellant-Petitioner recites a litany of hard luck and case pressure to excuse his failures in managing this case. However, none of his excuses rises to the level of "excusable neglect". His Briefs are but an apologia for failure to follow the rules.

Counsel for Appellant-Petitioner says his staff was decimated, leading to his untimely filings and delays. In Hansen v. First Bank of South Dakota, 828 F.2d 1310 (8th Cir. 1987), the Court held that employee turnover such as attorney Needler complains of does not constitute excusable neglect and is considered well within the reasonable control of the attorney responsible for preparation of a Brief.

Appellant-Petitioner alleges confusion from the moving of counsel's office, which

disrupted his office routine and the alleged pressure of business caused his failure to file his Brief on time. This, Appellant-Petitioner claims, constituted "excusable neglect." This exact set of circumstances has been held NOT to be "excusable neglect" so as to render permissible granting of extension of time to file untimely notice. Selph v. Council of Los Angeles, 593 F.2d 881 (9th Cir. 1979)

Attorney Needler, in his Affidavit of May 13, 1989, lists 28 cases which he dealt with between the dates of April 25 and May 2, 1989. Appellee is unsure why this particularly
harried schedule of attorney Needler would be of import in the issue at hand; attorney Needler's Brief in the case at bar was due eight days before his globe-

trotting tour de force recited in his Affidavit. Besides which, as the First Circuit Court of Appeals has said, "most attorneys are busy most of the time and they must organize their work so as to be able to meet the time requirements of matters they are handling or suffer the consequences." Pinero Schroeder v. Federal National Mortgage Association, 574 F.2d 1117 (1st Cir. 1978). (emphasis added).

Since Appellant-Petitioner's Chapter 11 proceeding was dismissed on December 13, 1988, Appellant-Petitioner has filed no fewer than four Motions for Extensions, a lengthy Motion to Reconsider the Dismissal, two emergency Motions for Stay, an Amendment to his Motion to Reconsider, an Affidavit, and the untimely filed Brief of May 3, 1989. As the D.C. Circuit Court

of Appeals noted, "it may properly be commented that the time which Appellant must have occupied in preparing the numerous, voluminous papers which he has filed would have sufficed for the preparation of the Brief itself." Creel v. Creel, 184 F.2d 449, 453 (D.C. Dir. 1950).

Appellant-Petitioner argues that the busy practice of the attorney is excusable neglect. Almost every attorney can argue a busy practice but this does not make it excusable neglect. The Eleventh Circuit has found that a busy practice is not excusable neglect under Federal Rule of Civil Procedure 6(b). Clinkscales v. Chervon U.S.A., Inc., 831 F.2d 1565, 1569 (11th Cir. 1987)

Appellee has stated before, and now believes, that the dilatory tactics and

disregard of the Rules herein fall far short of "excusable neglect". Not one of Appellant-Petitioner's cases cited show such delays and extensions as he was allowed in this case. The claims of attorney Needler must be considered in light of the delays and excuses seen in this case. It is clear that the discretion of the Court allows dismissal. Dismissal will stand as long as there was not an abuse of discretion.

II. THE DISTRICT COURT PROPERLY DENIED DEBTOR-APPELLANT'S MOTION FOR RECONSIDERATION, WHICH WAS AFFIRMED BY THE COURT OF APPEALS AS APPELLANT-PETITIONER HAS SHOWN NO ABUSE OF DISCRETION ON THE PART OF THE DISTRICT COURT.

In the event Certiorari is granted, Appellant-Petitioner cannot prevail due to the fact there can be no abuse of discretion shown at the District Court level or in the affirmation by the Court of Appeals.

In his Brief Appellant-Petitioner apparently confuses his arguments regarding "abuse of discretion" and "excusable neglect". Appellant-Petitioner claims his many time constraints, lack of staff, and the "agony" suffered by farm families should have been sufficient for the District Court to ignore the clear rules of procedure and accept his untimely Brief. Appellant-Petitioner claims it was error for the District Court not to do so. There was no abuse of discretion here, where the District Court dismissed the Appeal of Appellant-Petitioner, after repeated extensions, for failure to file a Brief.

Appellant-Petitioner was given three opportunities to cure his failings. His chief complaint appears to be that the District Court erred by failing to give

him an additional extension, to April 30 (or May 1, depending on which of Appellant-Petitioner's arguments this Court wishes to peruse). His complaint fails to take into consideration that the Brief he ultimately lodged with the Court failed even to satisfy the final, prayed for, extension! His complaint also fails to show any abuse of discretion by the District Court.

The evidence in this case consists of dates on the calendar. A calendar does not lie, nor is it confusing. A Brief filed May 3 cannot be said to have met a deadline of April 17 of the same year. That evidence is clear. It is compelling. The Appellant-Petitioner was dilatory. Appellant-Petitioner failed to prosecute. The District Court properly dismissed the Appeal. The Court of Appeals properly

affirmed the Dismissal.

III. IF CERTIORARI IS GRANTED, APPELLANT-PETITIONER CANNOT PREVAIL BECAUSE IT HAS FAILED TO SHOW ANY REASONS NOT TO UPHOLD THE ORDERS OF THE HONORABLE GEORGE GUNN, DISTRICT JUDGE, AND THE HONORABLE DAVID P. McDONALD, BANKRUPTCY JUDGE.

If the Appellant-Petitioner was granted Certiorari, it cannot prevail because Appellant-Petitioner has failed to supply sufficient record to support the Appellant's claim attacking the Orders of the Bankruptcy Court and the District Court.

The Appellant-Petitioner argues the Chapter 11 Plan, though confirmed, was not consummated. He then proceeds without evidence or record to attempt to circumvent the Rules here, as well as in the other phases of this case. Appellant-Petitioner attempts to supply without proper evidence or record a claim of

modification of the Plan. The record shows the Appellant-Petitioner was in default and that Appellant-Petitioner's counsel never supplied any modification of the defaulted Plan. The facts show and the Bankruptcy Court found that Appellant-Petitioner was in material default and the Court properly dismissed his Chapter 11 under 11 U.S.C. Section 1112(b)(8).

The Appellant-Petitioner was in default on Court ordered installments of $36,584.60 due January 1, 1988 and $36,584.60 due January 1, 1989. While enjoying the protection of the Bankruptcy Court, Appellant-Petitioner had not accounted to the Court or its creditors for its income and crops. Appellant-Petitioner failed to produce its books, records and documents required by Order of the Bankruptcy Court. After hearing

evidence on September 15, 1987, November 15, 1988 and December 13, 1988, the Bankruptcy Court found that the Appellant-Petitioner was in material default with respect to a confirmed Plan under 11 U.S.C. Section 1112(b)(8) of the Bankruptcy Code. The Court further found that the proposed modifications of Plan by Appellant-Petitioner failed to meet the requirements of 11 U.S.C. Section 1127 of the Bankruptcy Code, that the Revised Modifications of December 11, 1988 and December 13, 1988 were not timely filed within the time fixed by the Court and that circumstances in this case did not warrant such modification. The bankruptcy case was dismissed on December 13, 1988. Appellee held a first Deed of Trust on real estate owned by Appellant-Petitioner.

This property has been foreclosed.

Any reinstatement of a Chapter 11 case could not include the real estate in a modified Plan. The farm was the principal asset of the Bankruptcy Estate. The entire exercise of the Appeals are moot.

Appellant-Petitioner makes much of his contention that the Plan, as confirmed, was unworkable. This is a bald attempt by Appellant-Petitioner to impeach his own Plan. The Debtor had counsel. The Debtor created his own Plan and submitted it to the Bankruptcy Court. Federal Land Bank of St. Louis, as creditor, had no part in developing the Plan which Debtor proposed, and which was confirmed. Appellant-Petitioner fails to point to anything in the record, nor does any evidence exist in the record, which would show the Plan was confirmed under duress or over the objections of the

Debtor. Appellant-Petitioner also fails to point to any evidence, nor does any exist in the record, which would show a viable substitute for the confirmed Plan.

It is hornbook law that an Appellate Court's review is limited to what is contained in the record. Thomson v. Gaskill, 315 U.S. 442 (1942), 4A CJS Appeal and Error, Section 1142 et. seq. Appellant-Petitioner's unsubstantiated assertions regarding the Chapter 11 Plan must therefore fall of their own weight.

In addition, reference to material not included in the Joint Appendix is subject to censure, and inclusion of such information in a Brief even more so. U.S. v. Anderson, 481 F.2d 685 (C.A.W.Va 1973) aff'd 417 U.S. 211 (1974).

The Appellant-Petitioner counsel throughout his Brief has repeatedly

referred to facts which are not in evidence and certainly not before the Court as a matter of record. Those matters, particularly in reference to the items claimed as counsel's excuses for his failures, are not in evidence. Thus they cannot be considered here.

The Appellant-Petitioner mistakenly refers to Federal Land Bank as a governmental entity. This is not correct, it is a private entity.

In addition, the Appellant-Petitioner never presented a coherent modification of the confirmed Chapter 11 Plan. Appellant-Petitioner's statements concerning such modified Plan cannot be a basis for a reversal of the Court of Appeals Affirmation of the District Court's Orders.

Absent a firm showing to the

contrary, there is a presumption that the judgments of the Bankruptcy Court, the District Court and the Court of Appeals are valid. Thompson v. King, 107 F.2d 307 (8th Cir. 1940), Henderson v. Kibbe, 431 U.S. 145 (1977). Appellant-Petitioner has failed to show any evidence that would overcome the presumption that the Decisions of the Bankruptcy Court the District Court and the Court of Appeals are valid. His Brief lists the same excuses as those presented to and ruled on by the Courts below, with no additional showing that would mark the Decisions of those Courts as irregular.

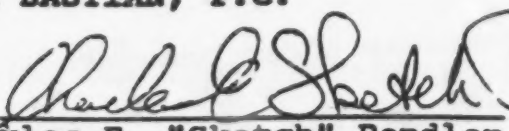
The failure to show any abuse of discretion by the lower Courts or any compelling new standard for excusable neglect gives no basis for a Writ of Certiorari to be granted.

CONCLUSION

The Appellee submits, that the Writ of Certiorari should be denied, as there is no conflict of decisions in this case. In the event a Writ is granted, Appellee respectfully requests that the Decisions of the Court of Appeals be affirmed.

Respectfully submitted,

RENDLEN, RENDLEN, REDINGTON and BASTIAN, P.C.

By: 
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Supreme Court, U.S.
FILED
JUN 17 1992
OFFICE OF THE CLERK

(3)

No. 91-1800

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

IN RE: HARLOW FAY, INC.,

Debtor.

HARLOW FAY, INC.,

Petitioner,

v.

FEDERAL LAND BANK OF
ST. LOUIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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No. 91-1800

In The
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IN RE: HARLOW FAY, INC.,

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v.

FEDERAL LAND BANK OF ST. LOUIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner, Harlow Fay, Inc., respectfully requests this Court to grant its Petition for Writ of Certiorari and to reject the arguments in the Brief In Opposition filed by Respondent, Federal Land Bank of St. Louis.

INTRODUCTION

The outline of this case presented by Respondent in its brief is not only garbled but very misleading and inaccurate. Suffice to say, that by repeating selected alleged facts over and over, Respondent hopes to prejudice this Court to the belief that the Petition at bar should be ignored because of a pattern of untimeliness and delay. The tactic is not worthy and violates this Court's rules.

While the merits of the dismissal of this case by the bankruptcy court is not at issue here (that is for the District Court sitting on appeal to address), some background is necessary for this Court to appreciate what is at stake and to be reassured that Petitioner has a meaningful cause below.

In reply to the Respondent's

erroneous recital of purported facts, Petitioner attaches as a further appendix the Order of the Bankruptcy Court dismissing the case and Debtor's Motion For Leave To File Modification Instanter with Affidavit.

Suffice to say, in Petitioner's view, the delay in proposing the modifications in the bankruptcy court was fully justified, as explained in Debtor's Motion For Leave To File . . . with Affidavit, attached herto as A 67 et seq.).

Typical of Respondent's distortions and inaccuracies is its restatement of the "central issue" at page 6 of its Brief -- i.e. "whether these two Courts [bankruptcy and District] abused their discretionary powers by dismissing the Appeal of Appellant- Petitioner."

First of all, the District Court dismissed Petitioner's appeal, and the

bankruptcy Court dismissed the case.

The main legal issues presented at bar are (1) does the standard of good faith or good cause shown apply or is "excusable neglect" the standard for filing untimely briefs, and (2) are the Petitioner's reasons sufficient to meet the standard, whatever it may be.

REPLY TO RESPONDENT'S ARGUMENT

I. Respondent Ignores The Conflict of Decision At Bar.

Far from being narrow and unique to this case, the action of the Eighth Circuit in endorsing excusable neglect as the standard for filing late bankruptcy appeals briefs (a standard more rigid and unforgiving than the rule by which it operates), will surely be generally applied in that Circuit. (See pages 41-42 of the Petition to the effect that the provisions for enlarging time in the

Appellate Court are set forth in FRAP 31c and 26(b) (A 62); that the standard is not excusable neglect but rather either good faith or "good cause shown.")

Of course, no other circuit would endorse an incongruous and erroneous standard of excusable neglect for late filing of briefs, and there are thus no other circuits which impose that standard. It is accordingly urgent and compelling that this Court intervene before such an erroneous standard gains currency in the Eighth Circuit.

Respondent erroneously states at page 11 of its brief that

> "Appellant-Petitioner claims that the Opinion of the Court of Appeals is in conflict with Harrison v. First Bank, 823 F. 2d 1310 (8th Cir. 1987)."

The Petitioner neither cites nor relies on a case called Harrison. Petitioner has distinguished a case

called Hanson v. First Bank of South Dakota, 828 F. 2d 1310 (8th Cir. 1987). That case does not involve turn over of staff in a lawyer's office. It involves a turnover of staff which prevented the creditor, Sperry-New Holland, from timely filing its ballot accepting debtor's plan. The standard of excusable neglect was applied because a bar date was involved. The unjust and Draconian result was the needless liquidation of a farmer simply because another creditor had filed a liquidating plan. The bankruptcy court forgot that it could relieve this situation under the provisions of 11 U.S.C., sec. 105 (the Bankruptcy Code) by simply ordering a re-balloting in the interests of equity and justice and to forward the purpose of the Code in achieving reorganizations and preventing liquidations. However, the

Hanson court did admit that the excusable neglect standard was a flexible one, and Petitioner at bar has demonstrated that it could qualify for relief even under that high standard. Petition, p. 32-35,38.

While it is true that only one deadline was missed in Hanson, it was a bar date, not a briefing date.

It is not true that "many deadlines were missed" below. According to the calculations of the Respondent only one "deadline" on appeal was missed. That of April 17, 1989. (See Respondent's Brief, p. 2-3). If the fourth application for extension of time to file brief for two weeks until April 31 (i.e. May 3), 1989 was ineffective, then the only deadline missed was April 17, 1989 and the Court should have allowed the brief to be filed instanter two weeks late. The fourth

application for extension, however, effective or not, demonstrates diligence, and should not be ignored. It is undisputed that Appellant's brief was originally due in the District Court on February 22, 1989. It was mailed for filing on May 3, 1989 (and according to rule would be deemed filed on that date if timely).

The District Court had no difficulty, according to the calculations of Respondent, in granting extensions to and including April 17, 1992. What possible prejudice a 16-day further extension could provide has never been explained by Respondent. Had Petitioner asked for one 45-day extension and another 30-day extension, the District Court, under the circumstances, could not properly have denied the extra time--for it surely would have been required to grant that

amount of time to new counsel had Mr. Needler been unable to proceed.[1] Then there would not have been "FOUR" extensions to complain about.

Petitioner does not understand what is meant by the Respondent's unsupported and unexplained contention at page 4 of its brief that Petitioner has failed to follow the Rules regarding preparation of the Record and Appendix in this case.

As this Court well knows, in the event certiorari is granted, this Court will enter an order requiring the record to be conveyed to it. If the Respondent is referring to the appeal below, should there be any record deficiency on remand, the matter can be easily corrected by

---

[1]Clearly, Mr. Needler would have been unable to proceed in any of the cases he was handling had he been forced to strictly comply with briefing and other schedules.

bringing forward those parts of the record not designated --in the event that something has been erroneously or improvidently left behind. Respondent does not say precisely what is not of record.

Petitioner does not understand Respondent's references to "Appellant-Petitioner's App._ _," as they do not refer to the Petition or Appendix at bar.

Federal Rule of Civil Procedure 6 and/or General Bankruptcy Rule 9006 should not apply to this case. The Bankruptcy Appeals rules should apply to this case, particularly Rule 8009(a), which without restriction specifically allows the District Court, by order, to set "different time limits" for briefs. The Rule is patterned after FRAP 31(c) which similarly allows time for briefing to be extended without restriction.

This Court should not be misled by cases cited by the courts below and Respondent which impose the excusable neglect standard in situations where bar dates are missed -- e.g. notice of appeal. Extensions for filing a notice of appeal in the District Court are governed by FRAP 4(a)(5) and not FRAP 31c and 26(b). Extensions for filing a notice of appeal in the Bankruptcy Court are governed by Bankruptcy Rule 8002(c) and not Bankruptcy Rule 8009(a). Accordingly, such cases as Selph v. Council of Los Angeles, 593 F. 2d 881 (9th Cir. 1979) have nothing to do with the issues here. But, it is to be noted that even under the rigid standard outlined in Selph, the Petitioner should succeed in gaining relief. This Court has stated that on a showing of "unique circumstances" a party will be permitted an otherwise untimely

appeal. Wolfsohn v. Hankin, 376 U.S. 203, 84 S. Ct. 699, 11 L. Ed. 2d 636 (1964).

There are no more unique circumstances than a law firm being unable to continue on as it is presently constituted and having to reduce itself to one man. The public interest demands relief in such a case to prevent prejudice to clients.

Again, at page 12 of Respondent's brief, counsel makes the false contention that Hanson v. First Bank of South Dakota 828 F. 2d 1310 (8th Cir. 1987) holds:

> ". . . employee turnover such as attorney Needler complains of does not constitute excusable neglect and is considered well within the reasonable control of the attorney responsible for preparation of a Brief."

Hanson has nothing to do with briefs, lawyers' employees, or the mistake or

neglect of an attorney.

Respondent claims that it cannot understand the significance of the 28 cases which Petitioner's attorney dealt with between April 25 and May 2, 1989. As stated in Mr. Needler's Affidavit, Petition, A 39-41, the transcript from the court reporter was not received until April 22, 1989. The brief could not be submitted until this transcript was reviewed. Obviously a further extension of time until April 31 (May 3) was justified and was needed to finish the brief considering Mr. Needler's work load. Attorney Needler also states that this was a typical workload since closing of the Chicago office on February 15, 1989.

Moreover, had the clerk of the bankruptcy court not docketed the appeal until she received the transcript (as

promised), there would have been no problem, for the case would have been docketed on or around April 22, and the brief, by the rules, would have been due on May 7, 1989 (and timely filed on May 3, 1989). See In re Beverly Manufacturing Corp. (Brake v. Tavormina), 778 F.2d 666 (11th Cir. 1985).

Typical of Respondent's arguments is this garbled non-sequitur:

> "The argument of Appellant-Petitioner that no case where the "excusable neglect" standard is applied to the untimely filing of Appellant's Brief may be due to the fact that jurisdictional requirements mandate a motion be before the Court to allow the filing of a late Brief.

Petitioner does not know precisely what is meant by this, but suffice to say the District Court considered and denied the Petitioner's Motion for Further Extension of Time on the ground that

excusable neglect was not shown. (Petition, A 13). If this "Fourth Motion" did not somehow qualify as a Motion To File (on some unstated and unsupported "jurisdictional" ground, then Petitioner's Motion To Reconsider, which specifically requests permission to file the brief instanter, certainly did (Petition, A 31-32). In any event, the filing of briefs is not jurisdictional. In re Beverly, supra, at 667. Nor, does any of the above have any relevance whatsoever to the fact that no other Circuit imposes a strict and high standard of excusable neglect on the late filing of briefs.

The above is simply Respondent's confession that it can find no case which applies the "excusable neglect standard" to the late filing of briefs, except the one at bar. In particular, the 5th Circuit, upon which the Respondent relies

does not apply such a standard. See Phillips v. Employers Mut. Liability Ins. Co., 239 F. 2d 78, 80 n.2 (5th Cir. 1956) holding that the late filing of briefs is a "non-jurisdictional" defect insufficient to warrant dismissal."

II. The District Court Clearly Erred in Applying the Wrong Standard for Late Filing of Briefs And Abused Its Discretion In Applying the Standard It Did.

Again, Petitioner has no idea what the Respondent means by

> "His complaint fails to take into consideration that the Brief he ultimately lodged with the Court failed even to satisfy the final, prayed for extension!" (Res. Brief, p. 18).

Of course, the brief filed in the District Court did not address the timeliness of its submission because it was thought on May 3, 1989 that the Petitioner's "fourth" motion for extension would be granted and the brief

filed. Petitioner could not conceive that two days hiatus in filing a fourth motion for extension or an meaningless and obvious technical mistake of requesting a non-existent date would have any relevance whatsoever (i.e. if Petitioner knew at the time that such a mistake had been made).

Also, Respondent claims that

> "His complaint also fails to show any abuse of discretion by the District Court." (Res. Brief, p. 18)

Petitioner has demonstrated that the District Court clearly erred in applying the wrong standard of excusable neglect and further abused its discretion in not allowing the late filing of brief, even were this the standard.

III. If Certiorari Is Granted, This Court Will Not Be Considering The Merits of the Dismissal In The Bankruptcy Court As That Is A Matter for The District Court On Remand.

Respondent claims that "Appellant-Petitioner" cannot prevail in this Court because it has failed to supply a sufficient record which supports an "attack" on the orders of the bankruptcy court and District Court. The orders of the bankruptcy court are not here at issue, and this Court, if certiorari is granted, will be issuing an order requiring the record in the Court of Appeals to be conveyed to it. (See Rule 16.2).

It is the desire of the Petitioner, Harlow Fay, Inc., to reorganize around its present assets. Simply because the Federal Land Bank satisfied its loan through foreclosure does not mean that the other creditors should be denied the benefits of a reorganized Harlow Fay, Inc. This action therefore is not moot.

Since counsel for petitioner has presented affidavits below, and/or has

further explained his disabilities in the hearings involved it is untrue that counsel's "excuses" are not of record.

One page after declaring that Petitioner's "excuses" are not a matter of record, Respondent concedes that these same excuses were "presented to and ruled upon by the Courts below." (Res. Br., p. 24-25).

It is also untrue that the Petitioner never submitted a coherent modification of the plan. The written Revised Modification, dated December 11, 1988 and presented to the bankruptcy court on December 13, 1988, and attached to Petitioner's brief in the District Court, is clear and speaks for itself.

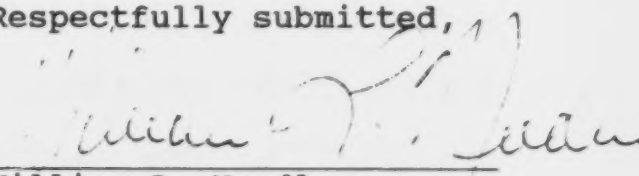
The Bankruptcy Court expressly found that before it on December 13, 1988 was "Debtor's Motion to Modify Note, Motion D, filed October 12, 1987, as amended by

Debtor's proposed Modification of December 13, 1988. The Bankruptcy Court, moreover, considered the revised modification of the Plan and determined that "circumstances in this case do not warrant such modification." (A 65-66, attached hereto."

CONCLUSION

Petitioner requests this Court to grant its Petition and the relief stated therein.

Respectfully submitted,



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FURTHER APPENDIX

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

In Re:	)	
	)	
HARLOW FAY, INC.,	)	Case No.
	)	85-00119(N)
Debtor.	)	

ORDER OF DISMISSAL

This matter is before the Court on the Motion of The Federal Land Bank of St. Louis to Dismiss, Motion No., C, filed July 20, 1987, and on Motion 06, being the Motion for Relief from the Automatic Stay of Farm Credit Bank of St. Louis as successor to the Federal Land Bank of St. Louis, filed October 3, 1988, and on the Debtor's Motion to Modify Note, Motion D, filed October 12, 1987, as amended by Debtor's proposed Revised Modification of December 13, 1988. The Court finds that Debtor is in material

default with respect to a confirmed Plan under 11 U.S.C., Section 1112(b)(8) of the Bankruptcy Code. The Court further finds that the proposed modifications of Plan by Debtor fail to meet the requirements of 11 U.S.C. Section 1127 of the Bankruptcy Code, that the Revised modifications of December 11, 1988 and December 13, 1988 were not timely filed within the time fixed by the Court and that circumstances in this case do not warrant such modification.

IT IS THEREFORE ORDERED that Motion D, Debtor's Motion to Modify Note and the revised Modification of December 13, 1988 is denied. IT IS FURTHER ORDERED that Motion C, the Motion to Dismiss of The Federal Land Bank of St. Louis is granted and this Chapter 11 proceeding is dismissed.

David P. McDonald
U.S. Bankruptcy Judge
Dated: December 13, 1988

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

IN RE:	)	Case No.
	)	85-00119(N)
HARLOW FAY, INC.,	)	Proceedings for
	)	Reorganization Of
	)	A Farmer Under
Debtor.	)	Chapter 11

MOTION FOR LEAVE TO FILE MODIFICATION INSTANTER

NOW COMES William L. Needler and Associates, Ltd., on behalf of the above Debtor and requests leave to file Revised Modification Instanter.

In support hereof, the debtor states as follows:

1. That on the 15th of November, extensive hearings were held on Motions for Relief, Motions to Compel, etc.;

2. Settlements read on the record

were made that day resolving the FmHA claim, the Mutual Benefit Claim and the Claim of the Brookfield Bank of Purdin;

3. In addition, the Debtors agreed to immediately pay funds to FmHA and to the Federal Land Bank of St, Louis (hereinafter "FLB"), these payments were made as represented to the Court on the record.

4. This Court ordered that the Stipulation and Agreement as to settlement with both FmHA and Mutual Benefit be served by Debtors counsel on all creditors and interested parties which was accomplished by mail on the 22nd of November, 1988;

5. Subsequent to this changes in the original Stipulation and Order were agreed upon between the parties and only received from Mutual Benefit by Debtor on

December 9th which revised Stipulation is being served contemporaneously herewith on all the parties.

6. The Debtor at this November 15, 1988, hearing expressed hope that now that all major claims except for the FLB had been settled , that settlement with FLB could be accomplished before the hearing set for hearing on any objections to settlements with FmHA and Mutual Benefit on December 13th, 1988 at 1:30 in Hannibal, Missouri

7. This Court ordered Plan Modification to be filed within three weeks which would have been on the 6th of December, 1988.

8. Early last week the Debtor conveyed a settlement offer to FLB which offer is incorporated in the revised modification. Also the revised

stipulation with Mutual Benefit is incorporated in these revisions also.

9. The Debtor could not meet the December 6, 1988 filling date because of this new offer to FLB, the revisions to Mutual Benefit Stipulation and other scheduling problems and has attached an affidavit of explanation hereto.

WHEREFORE, Debtor requests leave to file Revised Modification dated December 11, 1988 instanter there being no material disadvantage to interested parties by this delay of 6 days;

The Affidavit attached is expressly made a part of this and is incorporated herein as if separately stated above.

Respectfully submitted,

_____
William L. Needler
One of Debtors Attorneys

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

IN RE:	) Case No.
	) 85-00119(N)
HARLOW FAY, INC.,	) Proceedings for
	) Reorganization
	) Of A Farmer Un-
Debtor.	) der Chapter 11.

AFFIDAVIT

COUNTY OF COOK)
) SS
STATE OF ILLINOIS)

WILLIAM L. NEEDLER, on oath deposes and says that:

1. That affiant is Counsel of Record with local counsel Jackie Bailey

of Marceline, Missouri;

2. That affiant could not file revised modification without changes for Federal Land Bank which because of trial schedule of Affiant in North Platte, Nebraska, phone calls between affiant and affiants office in Nebraska and Chicago were not completed until 12:30 p.m. [o]n Friday the 9th of December 1988;

3. On Friday, the 9th of December, 1988, this Affiant was informed by the principal officer of the debtor, John Fay, that he had received Federal Land Banks recent land appraisal and had made an offer based on this proposal. This treatment has been placed in the December 11, 1988 revised modification;

4. On December 6, 1988, affiant was scheduled for a valuation hearing preliminary to confirmation i[n] North

Platte, Nebraska in Chapter 11 87-1486 before Timothy J. Mahoney and this case was settled after marathon meeting from 9:00 a.m. Monday morning through 10:30 a.m. Tuesday the 6th and the hearings concluded on the morning and afternoon of Wednesday the 6th of December, 1988.

5. Affiant could not reach Debtor on the 7th of December,1988;

6. A cash collateral hearing and settlement discussion on the 8th in Lincoln, Nebraska before Judge Minahan in In Re: Harold Henry, Case No. 88-40282 was not concluded until the afternoon at 2:00 p.m. on the 7th;

7. This affiant upon his return to Chicago was informed on the 9th of December that the revision in the Modification of December 11, 1988 for the Federal Land Bank was conveyed by Mr.

John Fay, Officer of the Debtor to Mr. Joe Ricahrdson, local officer of the Federal Land Bank so that they are now informed of the particulars of this modification;

8. Affiant could not read the Revised Modification to John Fay until the 11th; (Mr. Fay being unavailable prior to that).

9. Affiant does not believe this six day delay to be detrimental to the interested parties involved namely the FmHA, Mutual Benefit Brookfield Purdin and/or the Federal Land Bank of St. Louis;

10. This affiant would request that leave be granted to file revised modification and that he believes this delay necessary to include proper and approved treatment of the Federal Land

Bank together with the revisions to Stipulation with Mutual Benefit;

11. The affiant if called upon would testify to the truth of the above facts under oath before this Court;

12. Further affiant sayeth naught.

_____
William L. Needer

SUBSCRIBED and SWORN TO
before me this 11th
day of December, 1988.

/s/Hugh Dunlop, Jr.
Notary Public